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IN THE

Supreme Court of the United States

October Term, 1959

No. 771

CHARLES WALDER, *et al.*,

Petitioners,

against

PARAMOUNT PUBLIX CORP., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Charles Walder and Ethel L. Walder, as Trustees of the Tivoli Operating Corporation, a dissolved Florida corporation, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on December 1, 1959, affirming a summary judgment against petitioners entered in the United States District Court for the Southern District of New York, in an anti-trust suit for treble damages, premised upon the Sherman Act and Clayton Act anti-trust violations established in the case of *U. S.* v. *Paramount Pictures, et al.*, 66 F. Supp. 323 (June 11, 1946); *U. S.* v. *Paramount Pictures, et al.*, 70 F. Supp. 53 (December 31, 1946); *U. S.* v. *Paramount Pictures, et al.*, 334 U. S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (May 31, 1948); *U. S.* v. *Paramount Pictures, et al.*, 85 F. Supp. 881 (July 25, 1948). The Court of Appeals in effect held that Tivoli Operating Corporation could not demonstrate injury within the purview of *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 133 F. Supp. 839, 845 (S. D. N. Y. 1955) (A. 49).

The opinion in this decision conjectures the possibility that the injurious impact of an anti-trust conspiracy cannot extend to a suit for the benefit of a theater operating corporation which only came into existence after a forced 50-50 stock arrangement had been entered into between an independent operator or owner and a Paramount conspirator as a means of obtaining first run motion pictures for the newly formed corporation. The injury charged in the case at bar was in effect the conspiracy forced issuance of 50% of the substantial dividend paying capital stock of Tivoli Operating Corporation for inadequate consideration and conspiracy forced payment of unwarranted management fees to Paramount Enterprises a conspirator in order to obtain a better run of pictures than was theretofore permitted by the Paramount conspiracy, as alleged in paragraphs 81st through 85th and elsewhere in the complaint (A. 27-28).

Jurisdiction

The judgment of the Court of Appeals was made and entered on December 1, 1959 (A. 50). Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). Jurisdiction below was based upon Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. Section 15.

Statute Involved

Clayton Act, Sec. 4 (38 Stat. 731; 15 U. S. C. Section 15). That any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(As amended in 1956.)

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Questions Presented

1. Whether defendant conspirators whose acts are held to be violative of the antitrust laws are immunized from treble damage liability to a corporation which came into existence as a result of a conspiracy forced 50-50 prearranged stock distribution to a non-defendant co-conspirator and a competing independent theater owner seeking to avoid the consequences of the conspiracy [as conjectured in *Franchon & Marco, Inc.* v. *Paramount Pictures*, 133 F. Supp. 839, 845 (S. D. N. Y. 1955), the only case relied upon by the Court of Appeals (A. 49)].

2. Whether this case calls for the exercise of this court's supervisory jurisdiction in that the holding below reflects as Chief Judge Clark of the Court of Appeals, Second Circuit, noted in his dissenting opinion in the case of *Eagle Lion Studios, Inc.* v. *Loew's Inc.*, 248 Fed. 2d 438, at page 451, that there "seems to be a developing trend in some of our trial courts of hostility" toward antitrust cases.

Statement of the Case

The Facts

1. This is an action for treble damages for alleged violations of the antitrust law 15 U. S. C. Section 1 *et seq.* (A. 40).

2. Plaintiffs' theory is that, because of acts of defendants in an unlawful conspiracy to deprive the operators of the Tivoli Theatre in Miami, Florida, of prompt releases of motion pictures, the operators were forced by defendants to join with Paramount Enterprises, Inc., a wholly owned subsidiary of defendants Paramount Publix Corporation, in the formation of Tivoli Operating Corporation and that because of this conspiracy the latter corporation was forced to distribute (under economic coercion) one-half of Operating's stock to Enterprises, at an inadequate price. Plaintiff Trustees, on behalf of Tivoli Operating Corporation (dissolved), seek to recover from defendants the loss thus suffered by Operating (A. 40) and additionally the loss suffered in paying out unwarranted management fees to Paramount Enterprises as the result of the coercive effect of the conspiracy.

3. From the year 1928 to the present time the Walder family, through various corporations, has had exclusive ownership of the Tivoli Theatre, a neighborhood motion picture house in Miami, Florida. Save for the period between 1937 and 1947 operation of the theater also has been exclusively in the hands of the Walders. Until 1931 ownership and operation were both in the name of Tivoli Theatre, Inc. In 1931 ownership was transferred to Walwal Corporation. In 1937 Tivoli Operating Corporation was organized to replace Tivoli Theatre, Inc. in the operation of the theater. The total subscribed cash capital of Tivoli Operating consisted of $2,000: $1,000 paid in by Walwal in addition to its contribution of a lease for which it received rent, and $1,000 paid in by Paramount Enterprises, Inc.[1] Operating paid Walwal an annual rent of $9,600; Enterprises exerted its efforts in obtaining films for the Tivoli; and the net proceeds were divided between Walwal and

[1] During the period here involved Paramount Enterprises operated theaters in the Miami region and was a wholly owned subsidiary of defendant Paramount Pictures, Inc.

Enterprises in proportions which varied over the ten-year existence of the arrangement (A. 46). In addition, during this period, Paramount Enterprises received from Tivoli Operating management fees of $36,899.44 allegedly unwarranted (A. 28). In 1947 these arrangements were terminated, and operation of the theater passed to Tivoli Amusement Company, Inc., a corporation wholly owned by the Walder family. In 1951 the members of the Walder family, in their various capacities, filed a private antitrust action alleging that Enterprises was included in management of the Tivoli Theater, and in the profits therefrom, because of coercion exerted by defendants in preventing the Tivoli Theatre from receiving motion pictures for exhibition which the theater would have obtained had distribution been on a properly competitive basis. Thus plaintiffs alleged injury from practices condemned in *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948) (A. 47). An amended complaint (A. 1) was filed on January 30, 1956 which sets forth at paragraphs 81st through 85th the injury and damages allegedly incurred by Tivoli Operating Corporation from 1937 to 1947 (A. 27-28) which is the subject of this petition and prior appeal.

4. In the complaint there were five plaintiffs or groups of plaintiffs—(1) the members of the Walder family individually; (2) the members of the Walder family as trustees for Tivoli Theatre, Inc., a dissolved corporation; (3) the Walwal Corporation; (4) Tivoli Amusement Company, Inc.; (5) two members of the Walder family as two of the surviving three trustees of Tivoli Operating Corporation, a dissolved corporation.[2] At various stages of the pretrial proceedings all the plaintiffs have been eliminated from the case except the plaintiffs in category (5); the trustees of Operating Corporation. As to them, on September 29, 1958 the district court, in an unreported opinion, granted defendants' motion for summary judgment. An appeal followed (A. 47).

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[2] Operating was formally dissolved on Oct. 12, 1948.

History of the Litigation Otherwise

1. The original complaint was filed on September 4, 1951. In an opinion dated June 24, 1955 and reported at 132 F. Supp. 912 (S. D. N. Y. 1955), Judge Weinfeld granted defendants' motion for summary judgment to the extent of eliminating the Walders from the case, both as individuals and as trustees of Tivoli Theatre, Inc. Judge Weinfeld reasoned that the Walders individually had no standing since the only injuries alleged related to corporations of which the Walders were stockholders. Judge Weinfeld then held that under the controlling Florida law, the trustees of a dissolved corporation, fully as much as the dissolved corporation, were bound by the requirement that suits by a dissolved corporation be brought within three years after final dissolution (A. 48).

2. On December 17, 1956 Judge Leibell granted summary judgment dismissing Walwal from the case. He held that Walwal had received a fair rent from Operating (i.e., a conceded 15 per cent of gross receipts) in the ten-year period of Operating's existence. Walwal appealed from this decision, but on June 12, 1957 the appeal was dismissed for failure to prosecute (A. 48).

3. On June 5, 1958 Judge Dimock dismissed the complaint as to Tivoli Amusement. No appeal was taken (A. 48).

The Opinions Below

The case on appeal was argued before a court composed of Judges Lumbard, Waterman and Friendly (A. 50). The opinion without dissent was rendered by Judge Waterman (A. 45). This opinion displays a lack of understanding of the claim of Tivoli Operating Corporation. It states:

> "Thus the present plaintiffs complain that the very acts which created their corporation have also injured it, a difficult position for the trustees here to maintain successfully" (A. 49).

An accurate statement of the plaintiffs' claim in part is found in Judge Dimock's opinion (A. 40) in granting summary judgment on other grounds. It is as follows:

> "Plaintiffs' theory is that, because of acts of defendants in an unlawful conspiracy to deprive the operators of the Tivoli Theatre in Miami, Florida, of prompt releases of motion pictures, the operators were forced by defendants to join with Paramount Enterprises, Inc., hereinafter Enterprises, a wholly owned subsidiary of defendants Paramount Publix Corporation, in the formation of Tivoli Operating Corporation and in the distribution of one-half of Operating's stock to Enterprises, at an inadequate price. Plaintiffs, on behalf of Operating, seek to recover from defendants the loss thus suffered by Operating."

Tivoli Operating does not contend, as suggested by Judge Waterman's opinion, that it complains of injury from the very acts that created it. It contends that the clearances it obtained after its creation were conditioned upon the forced issuance of capital stock under an illegal and unenforceable prearrangement and the forced payment of management fees arranged for after its corporate creation without receiving adequate consideration therefor. In other words, Tivoli Operating is contending that because of the conspiracy it was forced to pay tribute in the nature of valuable stock and unwarranted management fees to obtain motion picture clearances it was legally entitled to in any event as established by the *Paramount* case, *supra*.

Furthermore, plaintiff trustees of Tivoli Operating have not argued as Judge Waterman asserts that Paramount Enterprises contributed $1,000 for management fees. It has argued the $1,000 was inadequate consideration for the stock and that the stock was distributed to Paramount Enterprises because of the coercive effect of the antitrust conspiracy upon Tivoli Operating Corporation. Likewise it is contended that unwarranted manage-

ment fees were paid by Tivoli Operating to Paramount Enterprises also because of the coercive effect of the conspiracy. In the latter connection it was pointed out to the Court of Appeals that since Paramount Enterprises had no more than a pre-arranged 50% interest in the newly formed corporation (i.e., Tivoli Operating) it could not have effectuated the payment of tribute heretofore described except through the coercive impact of the conspiracy. The foregoing is another indication that the Court of Appeals has not given careful consideration to the case incident to rendering its decision.

Another indication that arbitrary and capricious consideration is given to antitrust cases of this type, as suggested by Judge Clark in his dissenting opinion in the case of *Eagle Lion Studios, Inc.* v. *Loew's Inc., supra,* is the fact that the trial court (A. 40) and the Court of Appeals (A. 45) have completely ignored in their opinions any reference to or consideration of plaintiffs' claim for management fees set forth in paragraph 85th of the amended complaint (A. 28) or the affidavit of an expert (A. 35) as to the value of the stock distributed by Tivoli Operating to Paramount Enterprises. Triable issues are thereby raised which require more careful judicial consideration than demonstrated in the opinion of the Court below unless the defendants are immunized from liability to Tivoli Operating as the result of their circumventive device to avoid the consequences of the conspiracy as found in the *Paramount* case, *supra.* This point is raised because the Court of Appeals does not make it entirely clear on what premise they are actually affirming the trial court except as to their adherence to the opinion of Judge Dawson (referring to a different type of injury or damages) in *Fanchon & Marco, Inc.* v. *Paramount Pictures, supra,* at page 845, to the following effect:

> "Plaintiff may also be contending that Fanchon & Marco did not have an opportunity to open a first run theatre in Hollywood, except by allowing Paramount to own 50% of the stock of the theatre and

by agreeing to enter into the franchise agreement and service contract hereinbefore referred to. It must, however, always be kept in mind that this is not a suit for the benefit of Fanchon & Marco, but a suit for the benefit of Paramount Hollywood, which only came into existence after the fifty-fifty stock arrangement had been entered into and after an understanding had been reached that it was to operate as a first run Paramount Theatre.

However, even if the contention above mentioned could be advanced on behalf of Paramount Hollywood, it would still leave the question as to whether the plaintiff had established that the condition of which it complained was the result of a conspiracy or monopoly which violated the anti-trust laws.

The mere fact that Paramount was willing to enter into a franchise agreement for a first run theatre in Hollywood only upon condition that it owned 50% of the stock would not be a violation of the anti-trust laws unless plaintiff established that Paramount was a party to a conspiracy to monopolize or restrain commerce in the Los Angeles area by means of such agreements. Chief Judge Clark has well pointed out in Fifth and Walnut v. Loew's Inc., 2 Cir., 1949, 176 F. 2d 587, at page 590, certiorari denied 1949, 338 U. S. 894, 70 S. Ct. 242, 94 L. Ed. 549:

> "* * * The condemnation of joint interests in the decision in United States v. Paramount Pictures, Inc., D. C. S. D. N. Y., 70 F. Supp. 53, is not to be regarded as a declaration that joint ownership as such is illegal. It was made in a suit between the United States and various distributors and exhibitors on the basis of the particular facts of that case, and the presence of some of the defendants in the two actions did not relieve the plaintiffs in the present action from the necessity of satisfying the jury that a conspiracy existed. Of course, no one could reasonably contend that every joint ownership of a theatre, irrespective of all surrounding circumstances, is a violation of the Sherman Anti-trust Act; and no such decision has ever been made. * * *."

Reasons for Granting the Writ

The petition presents an important and novel question of law not previously determined, namely, whether the impact of a conspiracy, within the meaning of *U. S.* v. *Paramount, supra,* may extend to a corporate entity, created by a conspirator and an innocent independent motion picture theatre owner, as the result of an illegal conspiracy which had the coercive effect of wantonly and injuriously reducing its assets and income. In this respect, it is submitted that the decision of the Court below departs from the intent of the *Paramount* case.

The Supreme Court in *U. S. v. Paramount, et al., supra,* found the defendants guilty of a conspiracy to monopolize (1) by maintaining a nation-wide system of runs and clearance and (2) by agreeing individually with lessees to grant unreasonable clearance against theatres operated by their competitors. They were also found guilty of restraining trade by jointly operating or owning motion picture theatres with each other and with independents through operating agreements, profit-sharing leases, and stock interests. (See also *U. S.* v. *Paramount Pictures,* 85 Fed. Supp. 881, at pages 883, 884, 885). These conspiratorial acts imposed on Tivoli Operating (A. 27-28) had the coercive effect of forcing the payment of tribute for reasonable clearances. The tribute paid for reasonable clearances was a prearranged 50% distribution of capital stock to Paramount Enterprises a conspirator unenforceable except for the conspiracy and unwarranted management fees coercively arranged for by Paramount Enterprises after the creation of Tivoli Operating.

Tivoli Operating contends it was injured in issuing 50% of its capital stock for inadequate consideration and in paying out unwarranted management fees to Paramount Enterprises because of the coercion emanating from the conspiracy which forced it to pay such tribute in order to obtain a proper clearance of motion pictures for exhibition, thereby reducing its assets and income. This theory of

the case is entirely consistent with the decision in the *Fanchon* case, *supra*, upon which the Court of Appeals relies in holding to the contrary. As in effect stated by Judge Dimock (A. 41-42), the damages would be the difference between the value of the stock and the nominal amount paid. However, Judge Dimock held the stock received was not worth more than $1,000 because fair rent was paid under the lease according to Judge Leibell's prior decision (dismissing the Walwal Corporation course of action for lost rent from 1937 to 1947) and, therefore, the lease had no asset value upon which the capital stock value could be premised. Plaintiffs, however, claim that the asset value of the lease is a triable issue and that Judge Dimock and the Court of Appeals have completely ignored the further issue of injury and entitlement to a trial emanating from the forced payment of alleged unwarranted management fees by Tivoli Operating to avoid the consequences of the conspiracy. The only basis upon which the latter issue could be properly ignored would be to conclude that Tivoli Operating as a fifty-fifty creation of a co-conspirator and an independent theatre owner is precluded from proving injury under any circumstances. The Court of Appeals appears to take this position contrary to the position of Judge Dimock. The appellate court asserts that the Walwal Corporation is the aggrieved party rather than Tivoli Operating (A. 49). This overlooks the distinction between injury to Walwal as a landlord and separate injury to Tivoli Operating because of loss of assets and income emanating from the conspiracy. Although it is true that Walwal has an indirect interest as a stockholder of Tivoli Operating it cannot sue as a stockholder. In fact, a stockholder's action was dismissed in the case at bar on the ground that the corporate entity was the real party in interest (A. 48).

Also indicative of an arbitrary and capricious ignoring of controversial evidentiary issues which should have been allowed to be resolved at a trial by jury demanded by the plaintiffs is the affidavit of an expert, Sidney Lefcourt (A. 35), sworn to the 24th day of October, 1958, sub-

mitted to Judge Dimock on plaintiffs' motion to reargue, which opinions that based on earned profits, said 50% of the capital stock was worth $61,000 when issued to Paramount Enterprises in 1937 for $1,000. This affidavit is entirely uncontradicted except for a finding of Judge Leibell (A. 41) which has no pertinency in the light of the fact that earnings prove conclusively that the stock did have value which could only be attributable to a going business which The Walwal Corporation made available through its lease to Tivoli Operating, regardless of whether or not fair rent was paid under said lease. In fact, fair rent is not a figure that is unequivocal in amount. Dependent upon particular circumstances, it may be an amount in excess of minimum fair rent actually paid. This is demonstrated by the affidavit of Jules Pearlman (A. 39) sworn to the 24th day of October, 1958, and submitted in connection with plaintiffs' motion to reargue which states the maximum fair rent value also to be $36,121 (over an approximate period of 10 years) in excess of the contract rent paid (*i.e.*, 15% of gross receipts) which Judge Leibell held to be fair (premised upon his interpretation of the testimony of Charles Walder at his examination before trial). Judge Dimock's expressed theory that contract rent construed to be fair, precludes the lease under which it is paid from having asset value under all the circumstances, overlooks the fact that there are minimum and maximum limits of fair rent. If a minimum of fair rent is paid and that is what Judge Leibell's finding means, there would still be lease value beyond fair rent paid which even under Judge Dimock's theory could give capital value to the lease. Whether one accepts Judge Dimock's theory or not, however, the fact is that the lease had value as proved by the earned profits, so that one must reach the unequivocal conclusion that the lease from Walwal to Tivoli Operating was either consideration for capital stock as well as rent, or had a value in excess of the fair rent found by Judge Leibell to have been paid, as indicated by the Lefcourt and Pearlman affidavits[3] heretofore referred to.

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[3] These affidavits were a part of the record on appeal before the Court of Appeals.

Conclusion

Aside from the important and novel question of law heretofore referred to with regard to the immunization of the defendants from suit by a corporation in which a co-conspirator has a joint 50-50 interest with an innocent stockholder (as found by the Court of Appeals) the foregoing demonstrates the need for the exercise of this Court's supervisory jurisdiction and justification for Judge Clark's apprehension of the court hostility toward antitrust suits as enunciated by Judge Clark to the following effect as in *Eagle Lion Studios, Inc., supra,* at page 451:

> "There seems to be a developing trend in some of our trial courts of hostility towards the 'big' antitrust cases and of discovering obstacles—going even back to matters of pleading and pretrial—in the way of a free showing of the need of remedial relief. Humanly speaking we can well sympathize, for these trials are a burden, if not a bore, to a busy, overworked court. But we are dealing with settled and cherished Congressional policy which is not for us to change or hamper. I suggest that these judicially formed limitations are a definite infringement of legislative policy. However serious the load, I do not believe our able trial judges desire to take any permanent course thus opposed to legislative purposes. But here, while doubtless not contemplated, the course of trial has had that consequence. I think, therefore, it requires and deserves a new start at the trial level."

A writ of certiorari should accordingly be granted.

Respectfully submitted,

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Amended Complaint Filed January 30, 1956

(Record, pages 1156-1197)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The plaintiffs by Henry Pearlman their attorney for their Amended Complaint, allege:

First: That the above named Tivoli Theatre, Inc. was incorporated under the laws of the State of Florida, on or about June 25, 1928.

Second: That in or about the month of June, 1928, the said Tivoli Theatre, Inc. became the owner in fee of the premises known as and by the street number 734-744 West Flagler Street, in the City of Miami, State of Florida.

Third: That the said premises consisted of a single purpose building which, with the exception of two small offices and two small stores, was designed for and as a motion picture threatre with a seating capacity of approximately 925 seats.

Fourth: That on or about July 24, 1931, The Walwal Corporation was incorporated under the laws of the State of Florida; and that the individual plaintiffs, Charles Walder, Ethel L. Walder, Alvin Walder and Lester Walder, since the incorporation of said corporation were and still are all the stockholders, officers and directors thereof.

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Fifth: That in or about the month of June 1928, the said Tivoli Theatre, Inc. commenced to operate said theatre, as owner in fee of said premises, and continued to so operate the same, as owner in fee thereof, until on or about August, 1931, when it conveyed the whole of said premises to the said The Walwal Corporation, and thereupon the said Tivoli Theatre, Inc. continued to operate said theatre, as lessee thereof, from the said The Walwal Corporation, until on or about January, 1937.

Sixth: That ever since the conveyance of said premises from said Tivoli Theatre, Inc., to the said The Walwal Corporation, the said The Walwal Corporation has been and continued to be and still is the owner in fee of the whole of said premises, including said motion picture theatre.

Seventh: That the plaintiffs Charles Walder, Ethel L. Walder, Alvin Walder and Lester Walder, from the inception of the incorporation of said Tivoli Theatre, Inc., and until the dissolution thereof, as hereinafter set forth, were the stockholders, directors and officers of said Tivoli Theatre, Inc.

Eighth: That the plaintiffs Charles Walder, Ethel L. Walder, Alvin Walder and Lester Walder were and still are residents and citizens of the State of Florida.

Ninth: That the said Tivoli Theatre, Inc., was dissolved voluntarily on or about the 7th day of April, 1937, for the causes as hereinafter stated, and that the plaintiffs Charles Walder, Ethel L. Walder, Alvin Walder and Lester Walder, constituted the last board of directors of said Tivoli Theatre, Inc., and that by operation of the Statutes of Florida the said four directors became the trustees of the said Tivoli Theatre, Inc.

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Tenth: That the above named Tivoli Operating Corporation was duly incorporated under the laws of the State of Florida in or about the year 1936.

Eleventh: That in or about January 1937, the said Tivoli Operating Corporation became the lessee and operator of said motion picture threatre from the said The Walwal Corporation, and continued to operate said theatre until in or about May, 1947, as hereinafter more particularly set forth.

Twelfth: That the said The Walwal Corporation, upon the incorporation of the said Tivoli Operating Corporation, became the owner and holder of one-half of the issued shares of stock of said Tivoli Operating Corporation, and that the Paramount Enterprises, Inc., hereinafter referred to, became the owner and holder of the remaining one-half of the issued shares of stock of the said Tivoli Operating Corporation.

Thirteenth: That the plaintiffs Charles Walder and Ethel L. Walder and the above named defendant Fred H. Kent, and one Frank Rogers, now deceased, from the inception of the incorporation of said Tivoli Operating Corporation and until the dissolution thereof, as hereinafter set forth, were the directors and officers of said Tivoli Operating Corporation.

Fourteenth: That the said Tivoli Operating Corporation was duly dissolved voluntarily on or about August 17, 1948, for the causes as hereinafter stated; and that the plaintiffs Charles Walder and Ethel L. Walder, and the defendant Fred H. Kent, and the said Frank Rogers, now deceased, constituted the last board of directors of said

Tivoli Operating Corporation, and that by operation of the Statutes of Florida, the said four directors became the trustees of said Tivoli Operating Corporation; that by reason of the death of the said Frank Rogers, only three of said directors now constitute the trustees of said Tivoli Operating Corporation; that the said Charles Walder and Ethel L. Walder are suing herein as plaintiff-trustees of said Tivoli Operating Corporation, and that the said Fred H. Kent, is made a party defendant, as his interests are diametrically opposed to that of the said Charles Walder and Ethel L. Walder, and for that reason no demand was made upon the said Fred H. Kent to join as plaintiff, as such demand would be futile, and for the reasons more particularly hereinafter set forth.

Fifteenth: That upon information and belief, that the defendant Paramount Publix Corporation was and still is a corporation and organized under the laws of the State of New York.

Sixteenth: That upon information and belief, that the defendant Paramount Pictures, Inc., was and still is a corporation, incorporated under the laws of the State of New York.

Seventeenth: That upon information and belief, that the defendant United Paramount Theatres, Inc., was and still is a corporation and organized under the laws of the State of New York.

Eighteenth: That upon information and belief, that the defendant Paramount Pictures Corporation was and still is a corporation and organized under the laws of the State of New York.

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Nineteenth: That upon information and belief, that the defendant corporations specified and mentioned in the preceding paragraphs "Fifteenth" to "Eighteenth", inclusive, of this complaint, were and still are affiliated with each other; that each of said corporations mentioned in said paragraphs "Fifteenth" to "Eighteenth", inclusive, had and still has a proprietary and financial interest in each of the corporations of the other; that all of said corporations had and still have between and among them, interlocking stockholders, directors and officers; and that said corporations have united, combined, and conspired between and among themselves in the commission of the unlawful acts hereinafter mentioned.

Twentieth: That upon information and belief, that the defendant Paramount Film Distributing Corporation, was and still is a corporation, incorporated under the laws of the State of Delaware.

Twenty-first: That upon information and belief that at and during all the times herein mentioned, the defendant Paramount Film Distributing Corporation was and still is a wholly owned subsidiary of the defendant Paramount Publix Corporation, and of the other defendant corporations mentioned in the preceding paragraphs marked "Sixteenth", "Seventeenth" and "Eighteenth" of this complaint; and that the defendant Paramount Film Distributing Corporation was engaged in the distribution branch of the motion picture industry, and otherwise, in the State of Florida, and other States; and that said defendant Paramount Film Distributing Corporation was and still is dominated and controlled by the said defendant four corporations, and by the stockholders, directors and officers of the said four defendant corporations; and that the said defendant Paramount Film Distributing Corporation had

and still has with each of the four defendant corporations, aforesaid, interlocking stockholders, directors and officers; and that the said four defendant corporations united, combined and conspired with the defendant Paramount Film Distributing Corporation in the commission of the unlawful acts hereinafter mentioned.

Twenty-second: That upon information and belief, that E. J. Sparks Enterprises, Inc. was and still is a corporation incorporated under the laws of the State of Florida.

Twenty-third: That upon information and belief, that the said E. J. Sparks Enterprises, Inc., at and during all the times herein mentioned, was and still is a wholly owned subsidiary of the defendant Paramount Publix Corporation, and of the other defendant corporations mentioned in the preceding paragraphs marked "Sixteenth", "Seventeenth" and "Eighteenth" of this complaint; that the said E. J. Sparks Enterprises, Inc. was engaged in the exhibition branch of the motion picture industry, and otherwise, in the State of Florida; that the said defendant E. J. Sparks Enterprises, Inc. was and still is dominated and controlled by the said four defendant corporations and by the stockholders, directors and officers of the said four defendant corporations; that the said E. J. Sparks Enterprises, Inc. had and still has with each of the said four defendant corporations, aforesaid, interlocking stockholders, directors and officers; and that the said four defendant corporations united, combined and conspired with the said E. J. Sparks Enterprises, Inc., in the commission of the unlawful acts hereinafter mentioned.

Twenty-fourth: That upon information and belief, that Paramount Enterprises, Inc. was and still is a corporation, incorporated under the laws of the State of Florida.

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Twenty-fifth: That upon information and belief, that at and during all the times herein mentioned, the said Paramount Enterprises, Inc. was and still is a wholly owned subsidiary of the defendant Paramount Publix Corporation, and of the other defendant corporations mentioned in the preceding paragraphs marked "Sixteenth", "Seventeenth" and "Eighteenth" of this complaint; and that the said Paramount Enterprises, Inc. was engaged in the exhibition branch of the motion picture industry, and otherwise, in the State of Florida; and that said Paramount Enterprises, Inc., was and still is dominated and controlled by the said four defendant corporations, and by the stockholders, directors and officers of the said four defendant corporations; and that the said defendant Paramount Enterprises, Inc., had and still has with each of the said four defendant corporations, aforesaid, interlocking stockholders, directors and officers; and that the said four defendant corporations united and combined and conspired with the said Paramount Enterprises, Inc., in the commission of the unlawful acts hereinafter mentioned.

Twenty-sixth: That upon information and belief, that Florida State Theatres, Inc., was and still is a corporation, incorporated under the laws of the State of Florida.

Twenty-seventh: That upon information and belief, that at and during all the times herein mentioned, the said Florida State Theatres, Inc., was and still is a wholly owned subsidiary of the defendant Paramount Publix Corporation, and of the other defendant corporations mentioned in the preceding paragraphs marked "Sixteenth", "Seventeenth" and "Eighteenth" of this complaint; that said Florida State Theatres, Inc. was engaged in the exhibition branch of the motion picture industry, and otherwise, in the State of Florida; that said defendant Florida State Theatres, Inc., was and still is dominated and controlled by the said defendant four corporations, and by the stock-

holders, directors and officers of the said four defendant corporations; that the said Florida State Theatres, Inc. had and still has with each of said four defendant corporations, aforesaid, interlocking stockholders, directors and officers; and that the said four defendant corporations united, combined and conspired with the said Florida State Theatres, Inc., in the commission of the unlawful acts hereinafter mentioned.

Twenty-eighth: That upon information and belief, that the defendants Paramount Publix Corporation, Paramount Pictures, Inc., United Paramount Theatres, Inc., Paramount Pictures Corporation and Paramount Film Distributing Corporation, and with their affiliates and subsidiaries, owned approximately twelve hundred (1200) motion picture theatres in and throughout the United States.

Twenty-ninth: That the said Paramount Enterprises, Inc., E. J. Sparks Enterprises, Inc., and Florida State Theatres, Inc., named in this complaint, are not made parties to this action, because they are not subject to the jurisdiction of this Court, and cannot be made parties to this action without depriving this Court of jurisdiction.

Thirtieth: That upon information and belief, that the defendant Radio-Keith-Orpheum Corporation was and still is a corporation organized under the laws of the State of Maryland.

Thirty-first: That upon information and belief that the defendant RKO Film Distributing Corporation was and still is a corporation organized under the laws of the State of Delaware.

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Thirty-second: That upon information and belief, that the defendant RKO Pictures Corporation was and still is a corporation organized under the laws of the State of Delaware.

Thirty-third: That upon information and belief, that the defendant RKO Radio Pictures, Inc. was and still is a corporation organized under the laws of the State of Delaware; and, that at and during all the times herein mentioned, the defendant RKO Radio Pictures, Inc. was and still is a wholly owned subsidiary of the defendant Radio-Keith-Orpheum Corporation.

Thirty-fourth: That upon information and belief, that the defendants Radio-Keith-Orpheum Corporation, RKO Film Distributing Corporation, RKO Pictures Corporation, and RKO Radio Pictures, Inc., were and still are affiliated with each other; that each of said four corporations had and still has a proprietary and financial interest in each of the other said corporations; that all of said four corporations had and still have between and among them, interlocking stockholders, directors and officers; and that said four corporations united, combined and conspired between and among themselves, in the commission of the unlawful acts hereinafter mentioned.

Thirty-fifth: That upon information and belief, that the defendant Radio-Keith-Orpheum Corporation, RKO Film Distributing Corporation, RKO Pictures Corporation and RKO Radio Pictures, Inc., and with their affiliates and subsidiaries, owned approximately one hundred and twenty (120) motion picture theatres in the United States.

Thirty-sixth: That upon information and belief, that the defendant Vitagraph, Inc., was a corporation organized

under the laws of the State of New York and thereafter changed its name to Warner Bros. Pictures Distributing Corporation.

Thirty-seventh: That upon information and belief, that the defendant Warner Bros.-First National Pictures, Inc., was and still is a corporation organized and existing under and by vitrue of the laws of the State of New York.

Thirty-eighth: That upon information and belief, that the defendant Warner Bros. Pictures, Inc. was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Thirty-ninth: That upon information and belief, that the defendant Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.) was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Fortieth: That upon information and belief, that the defendant Warner Bros. Pictures Distributing Corporation (formerly known as Vitagraph, Inc.), was a wholly owned subsidiary of the defendant Warner Bros. Pictures, Inc., and that said Warner Bros. Pictures Distributing Corporation was engaged in the business of distributing motion pictures in the State of Florida and other States.

Forty-first: That upon information and belief, that the defendants Vitagraph, Inc., Warner Bros.-First National Pictures, Inc., Warner Bros. Pictures, Inc., and Warner Bros. Pictures Distributing Corporation, were and still are affiliated with each other; that each of said four corporations had and still has a proprietary and financial interest in each of the other said corporations; that all of

said corporations had and still have between and among them, interlocking stockholders, directors and officers; and that said four corporations united, combined and conspired between and among themselves, in the commission of the unlawful acts hereinafter mentioned.

Forty-second: That upon information and belief, that the defendants Vitagraph, Inc., Warner Bros.-First National Pictures, Inc., Warner Bros. Pictures, Inc., Warner Bros. Pictures Distributing Corporation, and with their affiliates and subsidiaries, owned approximately five hundred (500) motion picture theatres in the United States.

Forty-third: That upon information and belief that the defendant Fox Film Corporation was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Forty-fourth: That upon information and belief, that the defendant Twentieth Century-Fox Film Corporation was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Forty-fifth: That upon information and belief, that the defendant Twentieth Century-Fox Film Corporation was and still is engaged in the business of producing, distributing and exhibiting motion pictures, either directly or through subsidiaries or associated companies, in various parts of the United States, including the State of Florida; and that it, and its subsidiary companies, owned approximately five hundred (500) motion picture theatres in the United States.

Forty-sixth: That upon information and belief, that the defendant Fox Film Corporation and the defendant

Twentieth Century-Fox Film Corporation, were and still are affiliated with each other; that each of said two corporations had and still has a proprietary and financial interest in the corporation of the other; that both of said corporations had and still have between them interlocking stockholders, directors and officers; and that said two corporations united, combined and conspired together in the commission of the unlawful acts hereinafter mentioned.

Forty-seventh: That upon information and belief, that the defendant Columbia Pictures Corporation was and still is a corporation organized and existing under and by virtue of the laws of the State of New York.

Forty-eighth: That upon information and belief, that the defendant Columbia Pictures Corporation was and still is engaged in the business of producing and distributing motion pictures, either directly or through subsidiary or associated companies in various parts of the United States, including the State of Florida.

Forty-ninth: That upon information and belief, that the defendants Adolph Zukor, Barney Balaban, Y. Frank Freeman, Stanton Griffis, Fred Mohrhardt, Harvey D. Gibson, Maurice Newton, Stephen Gallaghan, Leonard H. Goldenson, A. Conger Goodyear, Earle J. McClintock, John B. Hertz, and Duncan G. Harris, were and still are officers, directors, stockholders and agents of the defendants Paramount Publix Corporation, Paramount Pictures, Inc., United Paramount Theatres, Inc., Paramount Pictures Corporation and Paramount Film Distributing Corporation; and upon further information and belief, that the said individual defendants, were and still are officers, directors, stockholders and agents of the said E. J. Sparks Enter-

prises, Inc., Paramount Enterprises, Inc. and Florida State Theatres, Inc., and participated in and contributed towards the commission of the wrongful and unlawful acts hereinafter mentioned on the part of all of said corporations and shared in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fiftieth: That upon information and belief, that the individual defendants mentioned and described in the preceding paragraph next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-first: That upon information and belief, that the defendants Hiram S. Brown, Joseph Plunket, J. Miller Walker, Leo Spitz, B. B. Kahane, William Mallard, Herman Zohbel, P. M. Stern, Gordon E. Young, O. R. McMahon, M. H. Aylesworth, Cornelius N. Bliss and Maurice Goodman, were and still are officers, directors, stockholders and agents of the defendant corporations Radio-Keith-Orpheum Corporation, RKO Film Distributing Corporation, RKO Pictures Corporation and RKO Radio Pictures, Inc., and participated in and contributed towards the commission of said wrongful and unlawful acts hereinafter mentioned on the part of said defendant corporations, and shared in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fifty-second: That upon information and belief, that the individual defendants mentioned and described in the preceding paragraph next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-third: That upon information and belief that the defendants Harry M. Warner, Albert Warner, Jack L. Warner, Sam E. Harris, Herman Starr, Waddill Catchings, Stanleigh R. Friedman and Samuel Carlisle, were and still are officers, directors, stockholders and agents of the defendants Vitagraph, Inc., Warner Bros.-First National Pictures, Inc., Warner Bros. Pictures, Inc. and Warner Bros. Pictures Distributing Corporation, and participated in and contributed towards the commission of and wrongful and unlawful acts hereinafter mentioned on the part of said defendant corporations, and shares in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fifty-fourth: That upon information and belief, that the individual defendants mentioned and described in the preceding paragraph next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-fifth: That upon information and belief, that the defendants Joseph M. Schenck, Sidney R. Kent, William C. Michel, Darryl F. Zanuck, William Goetz, Sidney Towell, Felix A. Jenkins, H. C. Clarke and Spyros P. Skouras, were and still are officers, directors, stockholders and agents of the defendant corporations Fox Film Corporation and Twentieth Century-Fox Film Corporation, and participated in and contributed towards the commission of the said wrongful and unlawful acts hereinafter mentioned on the part of said defendant corporation, and shared in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fifty-sixth: That upon information and belief, that the individual defendants mentioned and described in the pre-

ceding paragraphs next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-seventh: That upon information and belief, that the defendants Harry Cohn, Jack Cohn, A. Schneider, Charles Schwartz, Saul Bornstein, Leo M. Blancke, Jack Kerner and L. J. Barbano, were and still are officers, directors, stockholders and agents of the defendant Columbia Pictures Corporation, and participated in and contributed towards the commission of the said wrongful and unlawful acts hereinafter mentioned on the part of said defendant corporation, and shared in the benefits, moneys and profits realized from the commission of said wrongful and unlawful acts directly or indirectly.

Fifty-eighth: That upon information and belief, that the individual defendants mentioned and described in the preceding paragraph next hereof, are residents and citizens of the State of New York, or are residents and citizens of States other than the State of Florida.

Fifty-ninth: That the jurisdiction of this Court to hear this complaint is based upon the diversity of citizenship of each of the plaintiffs to each of the defendants; and upon the fact that the controversy involves an amount of money in excess of three thousand ($3,000.00) dollars, exclusive of interest and costs; and also upon the further ground that this Court has original jurisdiction "of all suits and proceedings arising under any law to protect trade and commerce against restraint and monopolies;" and, as hereinafter set forth, this controversy involves a violation of Sections 1, 2 and 7 of the Act known as the "*Sherman Anti-Trust Act*" (Act of July 2, 1890, Chap. 647, 26 Stat. 209, as

amended; 15 U. S. Code, Sec. 1, et seq.) and Sections 1, 5 and 15 of the Act known as "*the Clayton Anti-Trust Act*" (Act of October 15, 1914, Chap. 323, 38 Stat. 730, as amended; 15 U. S. Code, Secs. 12-27, 18 U. S. Code, Sec. 412, 28 U. S. Code, Secs. 381-383, 386, 390, 29 U. S. Code, Sec. 52).

Sixtieth: That plaintiffs aver that this complaint is filed for the purpose of securing damages for injuries suffered in the businesses and properties of Tivoli Theatre, Inc., Tivoli Operating Corporation, the individual plaintiffs, the Walwal Corporation, and the Tivoli Amusement Company, Inc. on account of unlawful acts, conspiracies and combinations by and between and among the defendants herein, in restraint of trade and commerce, forbidden by the Anti-Trust Statutes of the United States, as more fully shown hereinafter; that the unlawful acts, conspiracies and combinations aforesaid have been not only by, between and among the defendants, but have existed also between and among them and other persons, natural and artificial, as will be more fully shown hereafter.

Sixty-first: That on July 20, 1938, the United States Government, through the Attorney General, filed in the District Court of the United States for the Southern District of New York, a suit in equity known as No. 87-273, wherein the United States of America was plaintiff and the identical corporations, who are defendants in this cause, were likewise defendants, together with other persons, natural and artificial; that said suit was filed under Section 4 of the Act of Congress, 1890, 15 U. S. C. A., entitled "*An Act to protect trade and commerce against unlawful restraint and monopolies*", commonly known as the *Sherman Act*, and instituted to prevent further violations by the defendants herein (and others) of Sections 1 and 2 of that

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Act, 15 USCA, paragraphs 1, 2, and wherein said defendants herein (with others) were charged with combining and conspiring unreasonably to restrain trade and commerce in the distribution and exhibition of motion pictures and to monopolize such trade and commerce in violation of the Sherman Act; and that said suit is commonly known as "*U. S.* v. *Paramount*" and various proceedings thereof have been reported, viz.:

(a) *U. S.* v. *Paramount Pictures, et al.*, 66 F. Supp. 323 (June 11, 1946);

(b) *U. S.* v. *Paramount Pictures, et al.*, 70 F. Supp. 53 (December 31, 1946);

(c) *U. S.* v. *Paramount Pictures, et al.*, 334 U. S. 131; 68 S. C. T. 915, 92 L. Ed. 1260 (May 3, 1948);

(d) *U. S.* v. *Paramount Pictures, et al.*, 85 F. Supp. 881 (July 25, 1948);

and that said decisions are prayed to be made a part hereof, in haec verba.

Sixty-second: That upon information and belief, that said suit by the United States Government against Paramount Pictures, Inc., et al., is still pending; and that the District Court for the Southern District of New York entered an additional decree in said cause February 8, 1950, and an appeal from that decree has been taken to the Supreme Court of the United States; and that the record on appeal thereon was certified to said Court of last resort May 22, 1950; and that upon information and belief, that no final disposition of the cause has yet been made.

Sixty-third: That Section 16 of Title 15 (4 F. C. A. supra) provides as follows:

"Whenever any suit or proceeding in equity or criminal prosecution is instituted by the United States to prevent, restrain or punish violations of any of the anti-trust laws, the running of the statute of limitations in respect of each and every private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceedings shall be suspended during pendency thereof" (October 15, 1914, c. 323, p. 5, 38 Stat. 731).

Sixty-fourth: That this action is based upon private rights, arising under said Anti-Trust Laws, based in whole or in part on matters complained of in *"U. S. v. Paramount"*, above mentioned; that this is more fully shown by reference to the reported decisions hereinbefore cited; and that this suit is brought against the defendants in this cause who were and still are, likewise, defendants in said cause of *"U. S. v. Paramount"*.

Sixty-fifth: That among the matters (but not all) complained of in said *"U. S. v. Paramount"* were acts by the defendants there, and who are now defendants herein, viz.:

(a) Enforcing unreasonable clearances against independent theatre owners or exhibitors.

(b) Protection to preferred exhibitor chains controlling several theatres to the detriment of independent theatre owners or exhibitors.

(c) Enforcement of minimum admission prices upon independent theatre owners or exhibitors.

(d) Preferential modification and reduction of film rentals allowed exhibitor chains but not to independent theatre owners or exhibitors.

(e) In addition, other acts and illegal practices were shown.

Sixty-sixth: That the same illegal practices, as set forth in the preceding paragraph next hereof, are complained of herein, together with other acts in violation of the Anti-Trust Laws.

Sixty-seventh: That all of the defendant co orations were and are engaged in interstate commerce and business and were so engaged at all times hereinbefore and hereinafter mentioned, in that they all shipped or caused to be shipped, motion picture films through various States of the Union, into the State of Florida, as well as other States, and licensed said films after exhibition in Florida, and other States, and finally giving shipping instructions to said exhibitors who, upon such instructions, shipped the films to other places among the various States of the Union.

Sixty-eighth: That the said Tivoli Theatre, Inc., as hereinbefore set forth, operated the said Tivoli Theatre for the exhibition of motion picture films continuously from on or about June 1928 to in or about January 1937; that thereafter, the said Tivoli Operating Corporation, as hereinbefore stated, continued to operate said theatre, from January 1937 to in or about May 1947; and that said Tivoli Theatre, Inc., and the said Tivoli Operating Corporation, as licensees of motion picture films produced outside of the State of Florida and transported into the State of Florida pursuant to licensing agreements, were engaged in interstate commerce.

Sixty-ninth: That almost all films of public popularity featuring well-known male and female stars and possessing the greatest public appeal were produced and distributed

by the defendant corporations above named, and one other, which were and are the major producers in the United States; that exhibitors possessed no opportunity for successful operation unless they had access to the products of the defendant corporations, or at least some of them; and that between 95% and 99% of all the feature pictures played in first run metropolitan motion picture houses through the United States were released by the major producers, namely, the above-named defendant corporations and one other.

Seventieth: That the above named producers, distributors, theatre owners and operators, being the defendants, and each of them, were engaged in a continuing conspiracy together, contrary to the provisions of the "Sherman Anti-Trust Act" and the "Clayton Anti-Trust Act", as hereinabove referred to, to illegally maintain in the City of Miami and its environs, a system of releasing motion picture film for exhibition in such a manner that theatres owned, leased and operated by any of the defendants, or by the subsidiaries of any of them, were given preference and priority in the exhibition of moving picture film over independent exhibitors and enjoyed prior runs of desirable motion pictures and enjoyed clearance over comparable and competing theatres not owned, controlled, leased or operated by any of the defendant companies; and that a system of release had been set up and existed by virtue of agreements between said defendants made pursuant to such conspiracy in restraint of trade, as hereinafter provided.

Seventy-first: That the so called "first run" theatres were located on the main street of Miami, known as East Flagler Street, and that all of such "first run" theatres were operated by the defendant Paramount Publix Corporation, and Paramount Pictures, Inc., Paramount Film

Distributing Corporation, and their subsidiaries and affiliates, Paramount Enterprises, Inc., E. J. Sparks Enterprises, Inc. and Florida State Theatres, Inc., and that the said theatres operated by the said defendants, and/or their subsidiaries and affiliates, were given the right to exhibit any "first run" film produced by any of the defendants for a certain period of time; and that upon the conclusion of such "first run" exhibitions, the defendants then licensed the exhibition of such film to the "neighborhood theatres", in outlying districts operated by said defendants, at various intervals, apart, known as "subsequent runs", and which "subsequent runs" comprised a period of approximately sixty-seven (67) days from the commencement date of the "first-run" exhibitions; and that although the defendants had completed showings of such film at all of its theatres located in said outlying districts, the defendants unreasonably withheld the licensing of said film to the plaintiffs, until three to five months elapsed, after the completion of said "subsequent runs", comprising 67 days, as aforesaid.

Seventy-second: That the theatres which were granted said desirable "runs" by the defendant distributors were owned and operated by one or more of the defendants, controlled by or affiliated with said defendant distributors or one or more of them, and said system was designed and used by the defendants to create unreasonable clearance in favor of distributor-controlled or affiliated theatres, over independent theatres, and to give the more advantageous playing position, or "runs" to the theatres owned and operated by or affiliated with any of the defendant distributors of motion picture film, and thus to suppress the competition of independent theatres, and that the entire system of release was utilized by the defendants to further an unlawful and illegal conspiracy and agreement, whereby inde-

pendent theatres were prevented from competing on equal terms with the producer and distributor-owned or affiliated theatres for the right to exhibit motion picture film; and the plaintiffs' theatre known as the Tivoli Theatre, was by virtue of this illegal system of release and its illegal use by the distributor defendants, unable to obtain the license of film from any of the defendant distributors until approximately from the fifth to the ninth month after the conclusion of the playing of such film in the so-called "first run" theatres.

Seventy-third: That by virtue of their geographical location the immediate competitors of the said Tivoli Theatre were the following theatres enjoying the following respective "runs", and owned by the following respective defendants, to wit:

(a) That the Paramount Theatre, located on East Flagler Street, between Second and Third Avenues, Miami, Florida, with a seating capacity of approximately 1282 seats, played "first run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc. and E. J. Sparks Enterprises aforesaid.

(b) That the Olympia Theatre, located on East Flagler Street, between First and Second Avenues, Miami, Florida, with a seating capacity of approximately 2162 seats, played "first run" and "second run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises aforesaid.

(c) That the Rex Theatre, located on East Flagler Street, between Second and Third Avenues, Miami, Florida, with a capacity of approximately 882 seats, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

(d) That the Roxy Theatre, located on South East First Avenue, between East Flagler Street and South East First Street, Miami, Florida, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

(e) That the Rosetta Theatre, located on North East Second Avenue, at 79th Street, Miami, Florida, with a capacity of approximately 948 seats, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

(f) That the Coral Gables Theatre, located in Coral Gables (adjoining Miami), Florida, with a capacity of approximately 1277 seats, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their

subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

(g) That the Flagler Theatre located on West Flagler Street, between Third and Fourth Avenues, Miami, Florida, with a capacity of approximately 888 seats, played "subsequent run" pictures, and was owned and operated by the defendants Paramount Publix Corporation, Paramount Pictures, Inc., and Paramount Film Distributing Corporation, and their subsidiaries and affiliates Paramount Enterprises, Inc., Florida State Theatres, Inc., and E. J. Sparks Enterprises, aforesaid.

Seventy-fourth: That pursuant to such illegal agreement and conspiracy, and in order to destroy the business of said Tivoli Theatre, in competition with distributor-owned, controlled or operated or affiliated theatres, none of the defendant distributors or producers of motion picture film would license any "features" film to the operators of said Tivoli Theatre for exhibition, prior to the expiration of 67 days, or until the playing of such film in the "subsequent run" theatres, which resulted in the operators of said Tivoli Theatre being unable to obtain any feature film for exhibition until after such film had been exhibited by all of the theatres competing with the Tivoli Theatre.

Seventy-fifth: That said unlawful conspiracy in contravention of the provisions of Sections 1 and 2 of the "Sherman Act" is a contract and combination and conspiracy and monopoly in restraint of trade and interstate commerce, in that the licensing of motion picture film produced in states, other than the State of Florida, is a transaction in interstate commerce, and the unlawful agreement and conspiracy and monopoly in restraint of said com-

merce, complained of herein, is expressly prohibited by the provisions of the "Sherman Anti-Trust Act" and the "Clayton Anti-Trust Act," hereinbefore referred to.

Seventy-sixth: That by reason of the ownership and control of the competitors of Tivoli Theatre, by the producer and exhibitor defendants, as aforesaid, and by reason of the other defendants acting in concert with them, the defendants have prevented the operators of said Tivoli Theatre from securing "subsequent run" films on a competitive basis; that the operators of said Tivoli Theatre have thus been relegated to a very inferior position in the exhibition of motion picture film, and compelled, by virtue of said unlawful conspiracy, to accept pictures for exhibition after the defendants' affiliated theatres were through with the exhibition of the same, and that the operators of said Tivoli Theatre were subjected to unfavorable conditions of availability, including clearance; and that the said operators of said Tivoli Theatre have thus been denied a free, open and untrammeled market in which to buy products based upon their ability and willingness to pay fair and reasonable film rentals; and that pursuant to such unlawful conspiracy, the competing theatres herein named have been granted unreasonable, discriminatory and arbitrary clearance and "runs" over the said Tivoli Theatre, and the operators of said Tivoli Theatre have thus been discriminated against and in favor of the theatres owned by the defendants.

Seventy-seventh: That since 1928, the owners and operators of Tivoli Theatre on various and divers occasions, demanded of defendants more favorable run of pictures and the same clearances enjoyed by like theatres, owned, operated and or controlled by defendants, but all

of said requests were rejected by defendants with the exception of the period of time between 1937 and 1947, as is hereinafter more fully set forth.

Seventy-eighth: That since 1928 and continuously up to the present time, defendants have so interfered with plaintiff's free operation of the Tivoli Theatre, that up to and including the present time, the Tivoli Theatre has been operated at a great loss of revenue.

Seventy-ninth: That by reason of the foregoing conspiracy and practices of defendants, the Tivoli Theatre, Inc. during the period 1931 and 1937, as lessee and operator of the Tivoli Theatre, was unable to operate the theatre leased by it from the plaintiff Walwal Corporation, at a reasonable profit and was obliged to default in the payment of rent pursuant to its lease. As a result thereof, the rental and market value of the Tivoli Theatre was and is materially injured all to the damage of the property and business of the Walwal Corporation. As a result thereof, said Walwal Corporation was unable to meet its mortgage and tax payments and was forced to borrow money for said purposes and to impair its credit and capital, all to the damage of its business and property.

Eighteenth: That on divers occasions during 1936, Charles Walder acting for himself, the Tivoli Theatre, Inc. and the Walwal Corporation, of which corporations he was officer, director and stockholder, requested the defendants to give the Tivoli Theatre more favorable product and clearances thereon, and pleaded with defendants that Walwal Corporation was in arrears in its interest, amortization and tax payments because it was unable to obtain any revenue for its theatre and that unless defendants

permitted better clearances and better product, the Walwal Corporation would lose the Tivoli Theatre.

Eighty-first: That in or about the month of February, 1937, the said Paramount Enterprises, Inc., an affiliate and subsidiary of defendants Paramount Publix Corporation, Paramount Pictures, Inc. and Paramount Film Distributors, and dominated and controlled by said defendants, their officers, directors and stockholders, agreed to give more favorable product and clearances to the Tivoli Theatre, providing the plaintiffs Walwal Corporation and Charles Walder would agree to the formation of a new corporation to be known as the Tivoli Operating Corporation, of which corporation Paramount Enterprises, Inc. would have 50% of the corporate stock, and the remaining 50% of said stock to go to the Walwal Corporation; that the Tivoli Theatre would be taken away from Tivoli Theatre, Inc. and leased to the new corporation Tivoli Operating Corporation under terms to be dictated by defendants; that Paramount Enterprises, Inc. would have compensation pursuant to a management contract in addition to its stock interest, all as more fully set forth in the agreement between Walwal Corporation, Charles Walder and Paramount Enterprises, Inc. dated February 10, 1937, a copy of which is hereto attached and made part hereof as Exhibit "A".

Eighty-second: That due to the economic duress of defendants, plaintiffs submitted to the demands of the defendants pursuant to the aforementioned contract of February 10, 1937. The Tivoli Theatre, Inc. was dissolved, the Tivoli Operating Corporation was formed, 50 shares of its 100 shares of stock were issued to the plaintiff Walwal Corporation and 50 shares to Paramount Enter-

prises, Inc., whereupon Paramount Enterprises advanced a rental payment to the Walwal Corporation ear-marked for the payment of Walwal's back taxes and mortgage payments then in default.

Eighty-third: That upon information and belief, that the other defendants herein aided and abetted the said Paramount Enterprises, Inc., and its affiliates aforesaid, towards the culmination and consummation of said transaction by duress and coercion over and upon the said Tivoli Theatre, Inc., The Walwal Corporation, and the individual plaintiffs herein, as set forth in the preceding paragraph next hereof.

Eighty-fourth: That the said Tivoli Operating Corporation operated said Tivoli Theatre during the period from January 1, 1937 to and including May 24, 1947, and during such period the said Tivoli Operating Corporation received motion pictures for exhibition in its theatre aforesaid from the defendants herein, on equal terms with some of the other outlying neighborhood theatres.

Eighty-fifth: That the said Paramount Enterprises, Inc. during the period from January 1, 1937 to May 24, 1947, by reason of the defendants' conspiracy and illegal acts, wrongfully received from the Tivoli Operating Corporation in the form of dividends the sum of $40,999.45, and during said period received by virtue of the same illegal acts and duress, the further sum of $36,899.46 from the Tivoli Operating Corporation in the form of alleged management fees, making a total of $77,898.91 received by said Paramount Enterprises, Inc. from the Tivoli Operating Corporation, which sum it would not have received but for the conspiracy, unfair practices and economic duress herein alleged.

Eighty-sixth: That the said The Walwal Corporation, during the said same period between January 1, 1937 and May 24, 1947, also received in the form of dividends from the said Tivoli Operating Corporation, the sum of Forty Thousand Nine Hundred and Ninety-Nine and 45/100 ($40,999.45) Dollars; that the said The Walwal Corporation, during the said same period from January 1, 1937 to and inclusive May 24, 1947, received in addition to the foregoing, and in the form of rents, the sum of One Hundred and Thirteen Thousand Eight Hundred and Seventy-Nine and 36/100 ($113,879.36) Dollars, from the said Tivoli Operating Corporation, making a total of One Hundred and Fifty-Four Thousand Eight Hundred and Seventy-Eight and 81/100 ($154,878.81) Dollars, received by said The Walwal Corporation, during said period from January 1, 1937 to and inclusive of May 24, 1947, from the said Tivoli Operating Corporation,

Eighty-seventh: That it follows from the two preceding paragraphs next hereof, that during said period between January 1937 to May 24, 1947, that while said Tivoli Operating Corporation was receiving motion pictures for exhibition on equal terms with some of the other neighborhood theatres, it realized earnings of Two Hundred and Thirty-Two Thousand Seven Hundred and Seventy-Seven and 72/100 ($232,777.72) Dollars, consisting of the following:

(a) To Paramount in the form of dividends and management fees	$ 77,898.91
(b) To Walwal in the form of dividends	40,999.45
(c) To Walwal in the form of rents	113,879.36
Total	$232,777.72

Eighty-eighth: That in a free market unhampered by defendants' conspiracy and illegal acts, the fair and reasonable rental value of the Tivoli Theatre would be approximately $20,000 per year.

Eighty-ninth: That the said Tivoli Theatre, Inc., during said period of operation and discrimination, between 1929 and 1936, a period of approximately eight (8) years, sustained a total net loss of Four Thousand One Hundred and Eight and 27/100 ($4,108.27) Dollars; and that besides such loss, no rent was charged against said Tivoli Theatre, Inc., for use and occupation of said theatre premises, during and until the time that said Tivoli Theatre, Inc., conveyed the fee to said premises to the said Walwal Corporation, on August 15, 1931, as aforesaid, and that no rent was paid by said Tivoli Theatre, Inc., as lessee, to the said The Walwal Corporation, the owner in fee of said premises, after August 15, 1931, and until January 1937, and that the fair and reasonable total rental value of said theatre premises, during said period of approximately eight (8) years, amounted to the sum of at least One Hundred Sixty Thousand ($160,000.00) Dollars; so that if the said Tivoli Theatre, Inc. had paid a rental, during said period of about eight (8) years, the net loss over said period of about eight (8) years would have amounted to approximately $164,108.27; and that, besides, no moneys whatsoever, during said period of about eight (8) years were available for the declaration and payment of any dividends.

Ninetieth: That if the said Tivoli Theatre, Inc., and the individual plaintiffs, had not been discriminated against in favor of the theatres owned and controlled by defendants, as aforesaid, and if said Tivoli Theatre, Inc. were granted films on equal terms with the theatres owned or

controlled by defendants, during the period between 1929 and through the year 1936, and in view of the fact that the earnings of said Tivoli Operating Corporation for the period between January 1937 and May 24, 1947 (comprising a period of ten years and four and a half (4½ months)) amounted to $232,777.72, then it would follow by comparison of said amount with the earnings of said Tivoli Theatre, Inc., for the period of said approximate eight (8) years, that the earnings of said Tivoli Theatre, Inc., for said period of eight (8) years, would roughly amount to eight-tenths (8/10) of said $232,777.72 or to the sum of $186,221.60, even in a market controlled by defendants and a larger sum in a free and untrammeled market.

Ninety-first: That as a direct result of defendants' conspiracy and unfair practices as alleged herein, the Walwal Corporation was deprived of rents as alleged in Paragraph "Seventy-ninth" supra, which, in the regular course of its business it should have received on the Tivoli Theatre during the period 1931 to 1937 in the sum of One Hundred and Twenty Thousand ($120,000.00) Dollars, and similarly, the Walwal Corporation was deprived of rents on said theatre during the period 1937 to 1947 in the sum of approximately Eighty Six Thousand One Hundred and Twenty-One ($86,121.00) Dollars, as the difference between the rental paid by Tivoli Operating Corporation under the dictates of defendants' conspiracy, and the rental that would have been paid in a free market, wherein the Tivoli Theatre would enjoy a position based upon its facilities and location rather than one dictated by defendants' economic duress, and similarly, for the same reasons stated, the Walwal Corporation has been deprived of approximately Forty-Eight Thousand ($48,000.00) Dollars in rents between 1947 and the present, and further, the

Walwal Corporation has, as the equitable owner of the stock held by Paramount Enterprises, Inc. been deprived of the sum of Forty Thousand Nine Hundred Ninety-Nine and 45/100 ($40,999.45) Dollars which said Paramount Enterprises, Inc. withdrew as dividends from the Tivoli Operating Corporation making a total of approximately Two Hundred Forty-Seven Thousand Two Hundred Ten ($247,210.00) Dollars with respect to which the Walwal Corporation has been damaged by the unlawful acts of the defendants.

Ninety-second: That upon information and belief, that the said Paramount Enterprises, Inc., and the defendants Paramount Publix Corporation, Paramount Pictures, Inc. and Paramount Film Distributing Corporation have assigned, transferred and set over unto the defendants United Paramount Theatre, Inc. and Paramount Pictures Corporation, the moneys and benefits which the former have unlawfully secured from said Tivoli Operating Corporation.

Ninety-third: That on or about the 7th day of April, 1947, the said Tivoli Operating Corporation has been voluntarily dissolved, as aforesaid, and that thereupon and on or about the 3rd day of November, 1947, the individual plaintiffs Charles Walder, Ethel L. Walder, Alvin Walder, and Lester Walder, have organized the plaintiff corporation Tivoli Amusement Company, Inc., which latter corporation ever since its incorporation aforesaid has been and still is operating said Tivoli Theatre, as lessee from the said The Walwal Corporation; and that during the period 1947 to 1951 Tivoli Amusement Company, Inc. received its motion pictures for exhibition in its theatre on equal terms with some of the other neighborhood theatres

which constituted its normal competitors, but that in or about 1951 defendants in the institution of competitive bidding with respect to clearances gerrymanded the bidding areas causing the Tivoli Theatre to either bid against theatres far superior to itself, in size, if not in accoutrements, or be relegated to subsequent runs with respect to the theatres with which it normally had simultaneous clearance, while said theatres being part of the Paramount Chain, did their bidding in an area especially gerrymanded so as to eliminate the competition of the aforementioned larger theatres. That as a result of the aforementioned violation of the intent and spirit of the Paramount decree, theatres of the Paramount chain of the same standing and directly in competition with the Tivoli Theatre are receiving first-run clearance while the Tivoli Theatre is relegated to a subsequent run. That as a result of the aforementioned illegal acts and restraint of trade and in violation of the Decree of the Supreme Court of the United States, the Tivoli Amusement Company, Inc. has since 1952, and up to the present been prevented from making a fair profit in an open market and has been caused to sustain substantial damage in the sum of One Hundred Thousand ($100,000.00) Dollars.

Ninety-fourth: That as a result of defendants' acts as alleged the plaintiff Tivoli Operating Corporation has been damaged in the sum of Seventy Seven Thousand and Eight Hundred Ninety-Eight 91/100 ($97,898.91) Dollars, the Walwal Corporation has been damaged in the sum of approximately Two Hundred and Seventy Thousand One Hundred Twenty-One ($270,121.00) Dollars for loss of rents, and Forty Thousand Nine Hundred Ninety-Nine and 00/00 ($40,999.00) Dollars for loss of dividends, and

the Tivoli Amusement Company, Inc. has sustained damages in the sum of approximately One Hundred Thousand ($100,000.00) Dollars, together with the interest on said sums.

WHEREFORE, plaintiffs demand judgment against the defendants for the damages by them sustained in the sums in which said damages shall appear upon the proof, and requests that said damages be treated in accordance with the laws pertaining to damages sustained by reason of the violation of the Anti-Trust Laws, together with a reasonable counsel fee and in addition the costs and expenses of this action.

Dated, January 27, 1956.

HENRY PEARLMAN,
Attorney for Plaintiffs,
Office & P. O. Address,
1440 Broadway,
Borough of Manhattan,
City of New York.

Affidavit of Sidney Lefcourt

(A part of the record before the Court below)

Before me, an officer authorized by law to administer oaths, appeared SIDNEY LEFCOURT, who after being duly sworn according to law deposes and says:

(1) That, he is a resident of Miami, Florida, and that his office is located at 1150 Southwest First Street in that city;

(2) That, he has been a certified public accountant since 1941 and that presently he is a partner in the accounting firm of Weber, Thompson & Lefcourt;

(3) That, he has been engaged to make an appraisal of 50% of the stock of Tivoli Operating Corporation acquired by Paramount Enterprises, Inc., in 1937. That, he has made this appraisal based on the following information submitted to him:

Dividends paid on 50% of the stock of Tivoli Operating Corporation, referred to above, during the ten year period from 1937 to 1947	$40,999.45
Management fees paid to Paramount Enterprises, Inc. because of their ownership of 50% of the stock in Tivoli Operating Corporation, for the abovementioned period	36,899.46
Making a total of	$77,898.91

as the total profit accruing from the ownership of their stock in the Tivoli Operating Corporation.

(4) Affiant, further states that in the making of his appraisal, he has made certain assumptions, to wit:

(a) That, the $77,898.91 referred to above was earned ratably and equally over the ten year period.

(b) That, the record of earnings shown above, have been taken into consideration as if they had been known in 1937 when the stock was acquired.

(5) Based on the above statement of facts and assumptions related above, affiant has made a computation of value using a rate of 5% per annum as a fair and reasonable return and affiant now states that in his opinion, the 50% of the stock of Tivoli Operating Corporation acquired by Paramount Enterprises, Inc. in 1937 had a value when acquired of $61,000.00.

Further, affiant, sayeth not.

SIDNEY LEFCOURT.

(Sworn to October 24, 1958.)

Affidavit of Jules Pearlman

(A part of the record before the Court below)

STATE OF FLORIDA }
COUNTY OF DADE } ss.:

BEFORE ME, the undersigned authority, personally appeared JULES PEARLMAN, who upon being duly sworn, deposes and says as follows:

I am a qualified Real Estate Appraiser with offices at 1015 Seybold Bldg., Miami, Florida. I am a Senior Member of the American Society of Appraisers; a fee appraiser for the Federal Housing Administration, and Dade County Board of Public Instruction, and a member of the Appraisal Committee of the Miami Beach Board of Relators. I have lived continuously in Miami, Florida since 1919. I have been engaged in buying, selling, building and appraising Real Estate for over twenty years. I am a member of the Miami, Miami Beach, Florida State and National Association of Realty Boards.

The Tivoli Theatre is a neighborhood motion picture theatre, located at 744 West Flagler St., in the City of Miami, County of Dade, State of Florida. It has been owned and operated by the Walwal Corporation since 1928. On February 6, 1937 the theatre was leased to the Tivoli Operating Corporation. This was a newly formed corporation in which the capital stock was owned 50% by Paramount Enterprises and 50% by the Walwal Corporation. The lease was in effect for a period of ten and a quarter years to May, 1947.

At the request of Mr. Charles Walder, of the Walwal Corporation, I have investigated and analyzed the said lease for the purpose of estimating a Fair Rent Value for the entire period of the lease.

Fair Rent Value, or Economic Rent is, in this instance, the maximum amount of Rent the lessee is warranted in paying and the lessor entitled to receive, based on the contribution to earnings imputable to the land, building, equipment and good will, as is evidenced from rentals of comparable theatres to typical exhibitors of motion pictures.

Based on historical study of the subject property, and an analysis of the operating figures furnished me, and correlated with a study of data and statistics of the period in question compiled by recognized authorities on motion picture theatre operation,

I hereby estimate the
Total FAIR RENT VALUE
for the entire period
of the lease—Feb. 7, 1937
To May 24, 1947—for the
Tivoli Theatre, including
Its Good Will, to be
$150,000.00
or $14,630.00 per annum.

This rental is equivalent to approximately 20% of the gross receipts of $759,193.00 for the period; and is $36,121.00 more than the Contract Rent of $113,879.36 actually paid.

The period covered by the lease was characterized by the acquisition of control of many independent movie theatres by the large chains, and a relatively profitable one for the business. Rentals for going theatres ranged from 15% to 25% of the gross receipts. Rents were justified and acceptable if the cost of film rental and all operating expenses including rent, did not exceed 94%, and there remained a net of 6% of the gross receipts for Proft and Dividends.

The total amount paid in for the capital stock of the Tivoli Operating Corporation was $2000.00. The corpora-

tion paid out as dividends during the lease period the sum of $40,999.45 to Walwal Corporation and $40,999.45 to Paramount Enterprises, or a total of $81,998.90. Adding $36,899.46 paid to Paramount Management (which Mr. Walder claims was just additional profit) the total was $118,898.35. This is 15.7% of the gross receipts for profits and dividends. As stated above 6% of the gross receipts was the typical net return.

It is my opinion that the fees paid to Paramount Management were not justified and certainly appear excessive. However considering only as profit the dividends of $81,998.90 paid to Walwal and Paramount Enterprises, the net profits are still a comparably excessive 12% of the gross receipts.

If the rent paid were the Fair Rent of $150,000.00, instead of the Contract Rent, the net profit would have been $82,779.00 or 11% of the gross receipts. If we consider the amount paid Paramount Management as expense, the net profit based on the Fair Rent would be $45,789.00 or 6% plus of the gross receipts.

20% of the gross receipts is clearly indicated as the Fair Rent.

I hereby certify that my estimate of the Fair Rent Value of the Tivoli Theatre for the period from Feb. 6, 1937 to May 24, 1947, is $150,000.00; that this is in excess of the actual Contract Rent paid by $36,121.00.

I further certify that I have no past, present, or contingent interest in the property appraised; or the Walwal Corporation; that the statements contained herein are true to the best of my knowledge and belief; that the conclusions herein have been reached on the assumption of the accuracy of the figures, data, and statistics at hand.

JULES PEARLMAN
Affiant Jules Pearlman, A.S.A.

(Sworn to October 24, 1958.)

Opinion of Judge Dimock

(A part of the record before the Court below)

This is an action for treble damages for alleged violations of the antitrust law 15 U. S. C. § 1 et seq.

Pursuant to an opinion of Judge Weinfeld dated June 24, 1955, 132 F. Supp. 912, the action has been dismissed as to plaintiffs Charles, Ethel, Alvin and Lester Walder, individually and as trustees of Tivoli Theatre, Inc. Pursuant to an opinion of Judge Leibell, dated December 14, 1956, and an opinion on reargument dated March 12, 1957, the action has been dismissed as to plaintiff The Walwal Corporation. By order dated June 5, 1958, I dismissed the complaint as to the Tivoli Amusement Company, Inc. That leaves only the claim of plaintiffs Charles and Ethel Walder as trustees for Tivoli Operating Corporation.

Defendants now move for summary judgment dismissing the complaint as to the trustees for Tivoli Operating Corporation.

Tivoli Operating Corporation, herein Operating, a Florida corporation, was voluntarily dissolved on August 17, 1948. Plaintiffs Charles Walder and Ethel L. Walder, hereinafter plaintiffs, allege that they and defendant Fred H. Kent are its trustees by operation of Florida law and that no demand was made on Kent to join as plaintiff because of his alleged adverse interest.

Plaintiffs' theory is that, because of acts of defendants in an unlawful conspiracy to deprive the operators of the Tivoli Theatre in Miami, Florida, of prompt releases of motion pictures, the operators were forced by defendants to join with Paramount Enterprises, Inc., hereinafter Enterprises, a wholly owned subsidiary of defendants Paramount Publix Corporation, in the formation of Tivoli Operating Corporation and in the distribution of one-half of Operating's stock to Enterprises, at an inadequate price. Plaintiffs, on behalf of Operating, seek to recover from defend

ants the loss thus suffered by Operating. Defendants make this motion for summary judgment on the ground that Enterprises paid full value for the stock issued to it.

The agreement pursuant to which the stock was issued was made on February 10, 1937, between three parties, The Walwal Corporation, hereinafter Walwal, Charles Walder and Enterprises. By it Walwal, the owner of the Tivoli Theatre, agreed to lease it on certain terms to Operating, the corporation to be formed, Enterprises agreed to manage the theatre and see that Operating got pictures under a specified schedule and Walwal and Charles Walder gave covenants not to compete. The agreement provided that the stock of Operating should be equally divided between Walwal and Enterprises upon payment into the corporation of $1,000 by each. This agreement was carried out. The corporation was formed, the stock was issued and the lease was executed.

Prior to the execution of the agreement Walwal had been the owner of the theatre and it had been operated by a corporation known as Tivoli Theatre, Inc. That corporation was dissolved after Operating took over.

Defendants base their motion on what they say is a finding by Judge Leibell in this case that the lease had no value. They say that the lease was the only asset of Operating and, if it had no value, the sum of $1,000.00 paid by Enterprises for one-half of the stock obviously was not inadequate.

Judge Leibell's ruling was made on a motion which resulted in his dismissal of Walwal's claim. He based that dismissal on the ground that Walwal suffered no damage when it leased the theatre to Operating because the lease was upon what Judge Leibell found to be a fair rental. I see no reason for disagreeing with that finding and, even were I disposed to act upon an opposite view, I doubt that I could properly do so in view of the chaos which would result from inconsistent rulings in a single lawsuit. I

accept it as established then that Operating had to give a dollar for every dollar's worth it received under the lease. Under the lease Operating received not only the building but its furnishings and equipment. The lease carried it by operation of law the trade name and good will of the theatre. *Shubert* v. *Columbia Pictures Corp.*, 189 Misc. 734, 739, Sp. Term, McNally, J., aff'd 274 App. Div. 751; see also *Stogop Realty Co.* v. *Marie Antoinette Hotel Co.*, 217 App. Div. 555, 564-5; *McDonald* v. *First Nat. Bank of Attleboro*, 1 Cir., 70 F. 2nd 69.

Thus the theatre and the equipment and the good will came to Operating by way of the lease and Operating was obligated to pay as rent for them every cent that they were worth. Half of the stock of a corporation with only the lease as an asset would not be worth more than the $1,000 that Enterprise paid for it. Perhaps the stock was worth more than the zero figure attributable to the lease but, if so, the value must have come from Operating's only other asset: Enterprises' agreement to manage the theatre. This agreement to manage the theatre was, however, a contribution by Enterprises. Enterprises thus gave for the stock at least as much as its value since, by hypotheses, it was solely what Enterprises gave that lent any value to the stock.

I accordingly agree with defendants that plaintiff trustees for Operating have failed to show any loss and I therefore direct summary judgment dismissing the complaint as to Charles Walder and Ethel L. Walder as trustees for Tivoli Operating Corporation.

Settle order on notice.

Dated: September 27, 1958.

E. J. Dimock
United States District Judge

Motion for Reargument Denied

(Record, page 1584)

"Oct. 28, 1958

Motion respectfully referred to Judge Dimock at the request of counsel and with Judge Dimock's consent.

ALEXANDER BICKS
U.S.D.J."

"Motion denied.

October 30, 1958. Memo Endorsed.

E. J. Dimock, U.S.D.J.

Judgment Dismissing the Claims of Charles and Ethel Walder as Trustees of Tivoli Operating Corporation, Filed October 30, 1958

(Record pages 1599-1602)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The defendants having moved, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment dismissing the claims of plaintiffs, Charles Walder and Ethel Walder as trustees of Tivoli Operating Corporation; and

Judgment Dismissing the Claims of Charles and Ethel Walder as Trustees of Tivoli Operating Corporation, Filed October 30, 1958

The defendants having submitted memoranda of law in support of their motion and having appeared by their respective attorneys and the plaintiffs Charles Walder and Ethel Walder as trustees of Tivoli Operating Corporation having submitted memoranda of law in opposition to said motion and having appeared by their attorney and the motion having been orally argued before the Honorable Edward J. Dimock, United States District Judge; and

The Court after due deliberation having granted said motion by its opinion filed September 29, 1958; now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED, that the claims of plaintiffs Charles Walder and Ethel Walder, as trustees of Tivoli Operating Corporation alleged or set forth by them or on their behalf herein be and the same are hereby dismissed with prejudice and the Clerk is hereby directed to enter judgment thereon; and it is hereby further

ORDERED, ADJUDGED AND DECREED that the defendants recover of the plaintiffs their costs and disbursements in this action.

/s/ E. J. DIMOCK
U. S. D. J.

/s/ H. A. C.

Dated: October 30th, 1958,
New York, N. Y.

Judgment Entered October 30th, 1958.

/s/ HERBERT A. CHARLSON
Clerk

Opinion of United States Court of Appeals for the Second Circuit

Civ. 69-217

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 12—October Term, 1959.

(Argued October 9, 1959 Decided December 1, 1959.)

Docket No. 25471

CHARLES WALDER, *et al.*,

Plaintiffs-Appellants,

v.

PARAMOUNT PUBLIX CORP., *et al.*,

Defendants-Appellees.

Before:

LUMBARD, WATERMAN, FRIENDLY,
Circuit Judges.

Appeal from grant of defendants' motion for summary judgment, entered at pre-trial, United States District Court for the Southern District of New York, Dimock, *J.*, by which plaintiffs' claim for treble damages under the anti-trust laws was dismissed. Affirmed.

CLAUDIA PEARLMAN (Edgar A. Buttle, of counsel), New York City, for Plaintiffs-Appellants.

LOUIS PHILLIPS (E. Compton Timberlake, Marvin H. Ginsky, Bernard E. Kalman, of counsel), New York City, for Defendants Paramount Pictures Inc. (In Dissolution), Paramount Film Distributing Corporation and Paramount Pictures Corporation.

JEROME B. GOLDEN (E. Compton Timberlake, of counsel), New York City, for Defendant American Broadcasting-Paramount Theatres, Inc.

ROYALL, KOEGEL, HARRIS & CASKEY (John F. Caskey, Stanley Godofsky, of counsel), New York City, for Defendants TCF Film Corporation, a New York corporation, now dissolved, Warner Bros. Pictures Distributing Corporation and RKO Radio Pictures, Inc.

SCHWARTZ & FROHLICH (Myles J. Lane, Bernard R. Sorkin, of counsel), New York City, for Defendant Columbia Pictures Corporation.

WATERMAN, *Circuit Judge*:

From the year 1928 to the present time the Walder family, through various corporations, has had exclusive ownership of the Tivoli Theatre, a neighborhood motion picture house in Miami, Florida. Save for the period between 1937 and 1947 operation of the theater also has been exclusively in the hands of the Walders. Until 1931 ownership and operation were both in the name of Tivoli Theatre, Inc. In 1931 ownership was transferred to Walwal Corporation. In 1937 Tivoli Operating Corporation was organized to replace Tivoli Theatre, Inc. in the operation of

the theater. The total subscribed capital of Operating consisted of $2,000: $1,000 paid in by Walwal and $1,000 paid in by Paramount Enterprises, Inc.[1] Operating paid Walwal an annual rent of $9,600; Enterprises exerted its efforts in obtaining films for the Tivoli; and the net proceeds were divided between Walwal and Enterprises in proportions which varied over the ten-year existence of the arrangement. In 1947 these arrangements were terminated, and operation of the theater passed to Tivoli Amusement Company, Inc., a corporation wholly owned by the Walder family. In 1951 the members of the Walder family, in their various capacities, filed a private antitrust action alleging that Enterprises was included in management of the Tivoli Theatre, and in the profits therefrom, only because of prior coercion exerted by defendants in preventing the Tivoli Theatre from receiving motion pictures for exhibition which the theater would have obtained had distribution been on a properly competitive basis. Thus plaintiffs alleged injury from practices condemned in *United States* v. *Paramount Pictures*, 334 U. S. 131 (1948).

In the complaint there were five plaintiffs or groups of plaintiffs—(1) the members of the Walder family individually; (2) the members of the Walder family as trustees for Tivoli Theatre, Inc., a dissolved corporation; (3) the Walwal Corporation; (4) Tivoli Amusement Company, Inc; (5) two members of the Walder family as two of the surviving three trustees of Tivoli Operating Cor-

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[1] During the period here involved Paramount Enterprises operated theaters in the Miami region and was a wholly owned subsidiary of defendant Paramount Pictures, Inc.

poration, a dissolved corporation.[2] At various stages of the pre-trial proceedings all the plaintiffs have been eliminated from the case [3] except the plaintiffs in category (5), the trustees of Operating Corporation. As to them, on September 29, 1958 the district court, in an unreported opinion, granted defendants' motion for summary judgment. This appeal followed.

This lengthy discussion of the facts and the present posture of the case has been necessary in order to underscore the fact that the solitary question facing this court is the propriety of the district court's action in entering summary judgment against the trustees of Operating Corporation. No other plaintiffs are involved. As stated in the preceding paragraphs, Operating Corporation was, according to the Walder complaint, the fruition of the alleged conspiracy in violation of the anti-trust laws; i.e.,

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[2] Operating was formally dissolved on Oct. 12, 1948.

[3] A detailed history of the litigation is necessary at this point. The original complaint was filed on September 4, 1951. In an opinion dated June 24, 1955 and reported at 132 F. Supp. 912 (S. D. N. Y. 1955), Judge Weinfeld granted defendants' motion for summary judgment to the extent of eliminating the Walders from the case, both as individuals and as trustees of Tivoli Theatre, Inc. Judge Weinfeld reasoned that the Walders individually had no standing since the only injuries alleged related to corporations of which the Walders were stockholders. Judge Weinfeld then held that under the controlling Florida law, the trustees of a dissolved corporation, fully as much as the dissolved corporation, were bound by the requirement that suits by a dissolved corporation be brought within three years after final dissolution.

On December 17, 1956 Judge Leibell granted summary judgment dismissing Walwal from the case. He held that Walwal had received a fair rent from Operating in the ten-year period of Operating's existence. Walwal appealed from this decision, but on June 12, 1957 the appeal was dismissed for failure to prosecute.

On June 5, 1958 Judge Dimock dismissed the complaint as to Tivoli Amusement. No appeal was taken.

plaintiffs claim that but for the alleged violations Operating Corporation would never have come into existence. Thus the present plaintiffs complain that the very acts which created their corporation have also injured it, a difficult position for the trustees here to maintain successfully. In an effort to escape their predicament plaintiffs contend that Enterprises, a named co-conspirator though not a defendant, received as a result of the alleged coercion more from Operating than it contributed. Plaintiffs argue that Enterprises contributed only $1,000 in exchange for the far more valuable right to proceeds from the management of the theater resulting from the extremely favorable lease which Walwal offered to Operating. Plaintiffs' argument, however, is patently unsound. For its $1,000 contribution to Operating's capital Enterprises received exactly what it paid for, a 50% interest in a corporation that had no assets except the capital the two parties paid in. And even if we should assume that there was evidence to support plaintiffs' contention that the rent under the lease was unfairly low and that the point was still open to plaintiffs despite their failure to prosecute their appeal from Judge Leibell's order finding the rent to be fair,[4] the aggrieved party would be Walwal, not Operating. The district court quite properly concluded that Operating could not demonstrate injury. Cf. *Fanchon & Marco, Inc.* v. *Paramount Pictures,* 133 F. Supp. 839, 845 (S. D. N. Y. 1955).

Disposing of the case as we do, we do not reach appellees' other contentions.

Judgment affirmed.

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[4] See footnote 3, *supra.*

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of December, one thousand nine hundred and fifty-nine.

Present:

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

CHARLES WALDER, *et al.*,
Plaintiffs-Appellants,

v.

PARAMOUNT PUBLIX CORPORATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, with costs to the appellees.

A. DANIEL FUSARO,
Clerk.

A true copy.

A. DANIEL FUSARO,
Clerk.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 24 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1959

No. 771

CHARLES WALDER, ET AL.,

Petitioners,

v.

PARAMOUNT PUBLIX CORP., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JOHN F. CASKEY
100 Broadway
New York, N. Y.
Attorney for Respondents TCF Film Corporation, a New York corporation, now dissolved, Warner Bros. Pictures Distributing Corporation and RKO Radio Pictures, Inc.

MYLES J. LANE
19 East 70th Street
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Attorney for Respondent Columbia Pictures Corporation.

E. COMPTON TIMBERLAKE
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Attorney for Respondent American Broadcasting-Paramount Theatres, Inc.

LEONARD KAUFMAN
E. COMPTON TIMBERLAKE
1501 Broadway
New York, N. Y.
Attorneys for Respondents Paramount Pictures, Inc. (In Dissolution), Paramount Film Distributing Corporation and Paramount Pictures Corporation.

March 25, 1960

Supreme Court of the United States

OCTOBER TERM, 1959

No. 771

CHARLES WALDER, *et al.*,
Petitioners,

v.

PARAMOUNT PUBLIX CORP., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

This is a petition filed by unsuccessful plaintiffs in a private motion picture antitrust action whose arguments when considered by the Court of Appeals for the Second Circuit were characterized as wholly unfounded.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 272 F. 2d 349, and is printed in the Appendix to the Petition at pages A45 et seq.*

*"(Pet.)" refers to the Petition. "(Pet. A—)" refers to the Appendix to the Petition. "(D. A. —)" refers to Respondents' Appendix in the Court of Appeals. "(P. A. —)" refers to Petitioners' Appendix in the Court of Appeals.

The opinion of the District Court is not officially reported, but it is printed in the Appendix to the Petition at pages A40 et seq.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). The judgment of the Court of Appeals was entered December 1, 1959.

Counter-Statement of the Question Presented

Will certiorari issue in a case where none of the factors enumerated in Rule 19 exist, where the undisputed record facts clearly show that plaintiffs' business or property could not have been and was not injured in any way by the claimed conspiracy; where plaintiffs, rather than being legally injured, were the beneficiaries, if any conspiracy existed; and where the action is admittedly maintained for the benefit of parties no longer before the Court?

Counter-Statement of the Case

This action, commenced on September 4, 1951, was brought by five groups of plaintiffs, each of which was financially interested either in the ownership or in the operation of the Tivoli Theatre, Miami, Florida at some time prior to or subsequent to 1937. During various proceedings the claims of all of the groups of plaintiffs were dismissed and petitioners have conceded in their brief before the Court of Appeals that such dismissals were proper except for the dismissal as to The Walwal Corporation (as to which an appeal was noted but never prosecuted) and the dismissal as to the Trustees of the Tivoli Operating Corporation which is the subject of the instant petition.

Prior to February 10, 1937, the Tivoli Theatre, Inc. was the lessee and operator of the Tivoli Theatre in Miami, Florida.* Late in 1936 Charles Walder, who was president of The Walwal Corporation (hereinafter referred to as "Walwal") and of Tivoli Theatre, Inc., approached Paramount Enterprises, Inc. (hereinafter referred to as "Enterprises") (D. A. 128a). An agreement was negotiated, the substance of which was that a new corporation, Tivoli Operating Corporation (hereinafter referred to as "Operating"), would be formed to begin business with capital of $2,000. consisting of 100 shares of stock at $20. par value per share and with the stock to be owned 50% by Walwal and 50% by Enterprises; that Walwal would lease the Tivoli Theatre to Operating at a rental of $9600. per year against 15% of the gross receipts for a four year period, subject to cancellation after sixteen months; that Charles Walder would be employed by Operating as the theatre manager; and that Enterprises would handle the licensing of pictures for the Tivoli Theatre, pursuant to an agreement with Operating (D. A. 147a-164a). On February 10, 1937, the agreement outlined above was reduced to writing and was executed (D. A. 147a-164a).

Pursuant to the agreement Operating was incorporated in the State of Florida. Its Certificate of Incorporation which was, of course, drafted by the incorporators prior to the existence of Operating provided (D. A. 161a):

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*For the convenience of the Court we are setting forth a table which shows the owner and lessor and the lessee and operator of the Tivoli Theatre during each of the relevant periods:

Pre-1937	1937-1947	Post 1947
1. Owner and Lessor of Tivoli Theatre Property		
The Walwal Corporation	The Walwal Corporation	The Walwal Corporation
2. Lessee and Operator of Tivoli Theatre		
Tivoli Theatre, Inc.	Tivoli Operating Corporation	Tivoli Amusement Company, Inc.

"THIRD: The maximum number of shares of stock which this corporation is authorized to have outstanding at any time is one hundred (100) shares, of the par value of $20.00 each. All stock issued shall be fully paid and non-assessable. . . ."

"FOURTH: The amount of capital with which this corporation will begin business is two thousand ($2,000.00) dollars."

In accord with the agreement 50 shares of Operating stock were issued to Enterprises and 50 shares to Walwal for which each paid $1,000. This $1,000. payment by each stockholder was the sole consideration for the stock and petitioners' counsel conceded that the lease was not given by Walwal as consideration for the stock (D. A. 119a).

On February 11, 1937, Walwal leased the Tivoli Theatre to Operating (D. A. 165a-182a). Charles Walder, president of Walwal, testified in this action that the rent reserved under the lease was fair (D. A. 124a-127a). The issue of the fairness of the rent was determined by the District Court in three separate opinions which resulted in a judgment dismissing all of the claims asserted by Walwal (D. A. 198a, P. A. 38a, P. A. 64a). In those opinions the District Court considered and reconsidered the record facts and plaintiffs' arguments and held that the rent was fair. An appeal was taken, but, when it was not prosecuted, it was dismissed.

The original four year agreement and lease were subsequently extended.

On or about September 25, 1947, Operating ceased operating the Tivoli Theatre and ceased doing business (D. A. 211a). Walwal for purposes of cancellation surrendered the 50 shares of Operating stock which it held (D. A. 217a) to Enterprises so that prior to dissolution Enterprises owned all of the outstanding stock of Operating.

At the time of the judgment of the District Court from which this appeal was taken, the only claim remaining in the

action was the purported claim by the Trustees of Operating which was summarized in proceedings before the District Judge as being a claim that Operating gave half of its stock to the claimed conspirators as the result of an illegal conspiracy for $1,000. when it was worth a great deal more (D. A. 122a). The other half of Operating's stock, it should be noted, was issued to Walwal for exactly the same amount.

Tivoli Operating Corporation did not assert the usual types of antitrust claims. There was no claim that the run or clearance of the Tivoli Theatre during the period when it was operated by Operating was improper. In fact, the complaint in paragraphs 77, 84 and 87 alleges just the opposite. (Pet. A25-A26, A28, A29). There was no claim that Operating was ever compelled to pay unfair or excessive film rentals. There was no claim that Operating lost money or should have made more money during the period 1937 to 1947.

During the pretrial conferences, defendants moved for summary judgment based upon the undisputed documents, the admissions of Charles Walder and prior holdings of the Court that the rent received by Walwal was fair, the admissions by plaintiffs' attorneys that the lease was not given as consideration for the issuance of the stock and various other admissions of the plaintiffs and their attorneys. The motions for summary judgment were an integral part of full and complete pretrial hearings in this action, pursuant to an assignment of the case to one judge for all purposes. After an exhaustive argument and full briefing, the District Court entered summary judgment on the ground that Operating had not sustained any legal injury as a result of issuing fifty per cent of its stock to Enterprises (P. A. 77a-79a). Plaintiffs moved for reargument and submitted several affidavits (P. A. 80a-108a) but the District Court, in the exercise of its discretion, denied reargument (P. A. 109a).

The matter was fully briefed and argued in the Court of Appeals which unanimously affirmed the summary judgment

in favor of the defendants, on the basic ground that Operating had not suffered legal injury to its business or property within the meaning of the antitrust laws (Pet. A45-A49).

PETITIONERS HAVE SHOWN NO REASON WHY THIS COURT SHOULD GRANT CERTIORARI

It is of the utmost significance that plaintiffs have offered no reason which would justify the exercise by this Court of its discretion to grant a writ of certiorari, except for the assertion that the courts below were "arbitrary and capricious" (Petition, pp. 8, 11).

This is not a case where the Court of Appeals has rendered a decision in conflict with the decision of another circuit on the same matter. This is not a case where there is involved an important undetermined question of law which must be determined. Petitioners' assertion that the court below was "arbitrary and capricious" in rejecting their contentions is not supported by any factual showing whatsoever. The only ground upon which petitioners seek to rely is that their contentions were rejected both by the District Court and by a unanimous Court of Appeals.

Plaintiffs' contentions were carefully argued and briefed in the District Court. The transcript of the argument in the District Court runs to 407 pages and the briefs were complete and exhaustive. The questions were again briefed and argued in the Court of Appeals. Petitioners' briefs in that Court ran to 51 pages; respondents' brief was 65 pages. Full oral argument was had with each side being allowed one hour.

After a careful examination and analysis of petitioners' contentions, both the District Court and the Court of Appeals found that they were utterly without merit. What petitioners now seek to do is to require this Court again to review the facts and ultimately substitute its findings for those of the District Court and the Court of Appeals.

This Court has said it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275 (1948). No such showing of error has been made here. To the contrary, as we shall demonstrate, the findings of the courts below were clearly correct.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS WAS CORRECT.

The judgments of the District Court and the Court of Appeals dismissing the claims of Tivoli Operating Corporation were clearly correct.

At earlier stages of the case, counsel for the plaintiffs conceded that "the impact of this conspiracy was not on Operating, ..." (D. A. 120a). That binding concession was in accord with the fact and with the allegations of paragraph 83 of the complaint in which it is asserted that there was coercion upon each of the groups of plaintiffs *other than Operating* (Pet. A28).

The only one of the three groups of plaintiffs which could have suffered any injury as a result of the conspiracy alleged was Tivoli Theatre, Inc., which was the operator prior to 1937 and which, "but for" the alleged conspiracy would have continued to be the operator in the 1937-1947 period (D. A. 134a-135a). The claims of that corporation were dismissed for valid legal reasons, and in the court below petitioner conceded that the dismissal was "correctly premised." In an attempt to avoid the inevitable consequence of that dismissal, plaintiff sought to claim that some causes of action existed on behalf of Operating. It was conceded by petitioners below that this action was not for the benefit of the Trustees of Operating,

but that the Walders were in here "for their own pocketbook" (D. A. 121a-2a). The attempt to shift the claimed cause of action from a plaintiff whose claim had been correctly dismissed to Operating was unavailing because the indisputable record facts and logic demonstrated that Operating suffered no legal injury to its own business or property.

The fact is that "but for" the alleged conspiracy, Tivoli Theatre, Inc. would have continued to operate the theatre and Operating would never have come into existence. During the period when Operating ran the theatre, it obtained pictures on what is concededly a proper run. No claim is made that it was deprived of pictures or otherwise discriminated against by the distributors. Indeed, the charge is directly to the contrary: It is clear that Operating directly benefited from the alleged conspiracy. In these circumstances it is logically and factually apparent that Operating was not legally injured.

A hypothetical case will demonstrate the completely fallacious nature of the claim asserted: Assume that after the alleged conspiracy drove Tivoli Theatre, Inc. out of business, Paramount Enterprises simply leased the theatre from Walwal and operated it, through a wholly-owned subsidiary, on the run upon which it was actually operated by Operating. Could it seriously be asserted that Paramount Enterprises or its subsidiary would have an antitrust claim against the defendants here? Merely to state the question is to demonstrate the untenable nature of plaintiff's position.

The matter is well summarized in the opinion of the Court of Appeals as follows (Pet. A. 48-49):

> "As stated in the preceding paragraphs, Operating Corporation was, according to the Walder complaint, the fruition of the alleged conspiracy in violation of the anti-trust laws; i.e., plaintiffs claim that but for the alleged violations Operating Corporation would never have come into existence. Thus the present plaintiffs complain that the very acts which created their corpo-

ration have also injured it, a difficult position for the trustees here to maintain successfully."

In an attempt to escape from this predicament petitioners took the position that Operating was injured because Enterprises received, as the result of the alleged conspiracy, more from Operating than it contributed. In effect, plaintiffs argue that Paramount Enterprises contributed only $1,000. to the corporation, in exchange for the far more valuable right to proceeds from the management of the theatre, resulting from a claimed favorable lease which Walwal granted to Operating.

Plaintiff's counsel, in the District Court, had conceded that the lease was not consideration paid by Walwal for the stock (D. A. 119a). That concession was in accord with the lease itself which provided in Article 1 (D. A. 165a) that the only consideration for the lease was the rent reserved therein.*

The only contentions inserted in the record at any time were various affidavits submitted in support of a motion for reargument in the District Court. That those affidavits were entitled to no consideration and did not raise any genuine issue of fact is apparent from the face of the documents. The Lefcourt and Pearlman affidavits were based upon assumptions contrary to the record facts, such as the length of the lease. The Walder affidavit attempted to explain his prior sworn testimony as having referred "to the rental for the premises or a like premises of a non-operating business." (P. A. 108a). At his examination. Walder had said the rent was $9600. a year guarantee against 15% of the gross admission receipts (D. A. 126a). It is perfectly obvious that you cannot pay rent of 15% of the gross receipts of a "non-operating business." In any event, such affidavits and petitioners' arguments in connection therewith

*Even if it could be argued that the lease was consideration for the stock, it furnished no actual consideration since the rent received for the lease was fair. That fact was judicially determined in other proceedings in the District Court based upon concessions made by the President of Walwal.

were fully considered by the Court of Appeals, as is clearly demonstrated by the opinion below (Pet. A49).

> "For its $1,000 contribution to Operating's capital Enterprises received exactly what it paid for, a 50% interest in a corporation that had no assets except the capital the two parties paid in. And even if we should assume that there was evidence to support plaintiffs' contention that the rent under the lease was unfairly low and that the point was still open to plaintiffs despite their failure to prosecute their appeal from Judge Leibell's order finding the rent to be fair, the aggrieved party would be Walwal, not Operating. The district court quite properly concluded that Operating could not demonstrate injury. Cf. *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 133 F. Supp. 839, 845 (S. D. N. Y. 1955)."

In the final analysis, this is simply a case where through no fault of the defendants, the only plaintiff which could state a claim—Tivoli Theatre, Inc.—may not maintain this action. We submit that this fact does not give to Operating any claim which it would not otherwise have had.

The petition also takes the position that the Court of Appeals ignored the question of management fees, but fails to call this Court's attention to the fact that the claims were abandoned in the District Court (D. A. 122a). Having abandoned the claims in the District Court during pretrial conferences, petitioners may not raise such claims now.

There is absolutely no justification for the statements in the petition that this case was given "arbitrary and capricious" treatment. The record is clear that all arguments and claims asserted by the petitioners were fully briefed and carefully considered.

This is simply a case in which petitioners, having had a full and fair hearing in the District Court and the Court of Appeals, now seek to have this Court review the case without demonstrating any reason why certiorari should be granted.

CONCLUSION

For each of the reasons set forth above, we respectfully submit that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1959

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BRIEF FOR THE PETITIONERS IN REPLY TO RESPONDENTS' OPPOSITION

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BRIEF FOR THE PETITIONERS IN REPLY TO RESPONDENTS' OPPOSITION

This brief, in reply to respondents' brief in opposition to a writ of certiorari petitioned for, is filed for the purpose of inviting the attention of this court to certain unfounded statements of fact averred by respondents and equally unfounded argument premised thereon.

In the first place the Court of Appeals for the Second Circuit did not characterize petitioners' arguments as "wholly unfounded" as stated at page 1 of respondents' brief. It did attribute "a patently unsound" argument to the petitioner which petitioner made neither in the briefs nor during oral argument (A. 49). This is specifically discussed in the petition as being demonstrative of arbitrary and capricious consideration (Pet. 7).

Petitioners have not conceded as claimed by respondents at page 4 of their brief that the lease was not given by Walwal as consideration for the stock

Respondents at page 4 of their brief state:

> "In accord with the agreement 50 shares of Operating stock were issued to Enterprises and 50 shares to Walwal for which each paid $1,000. This $1,000 payment by each stockholder was the sole

consideration for the stock and petitioners' counsel conceded that the lease was not given by Walwal as consideration for the stock (D. A. 119a)."

The record (D. A. 119a) states:

> "The Court: * * * Instead of taking it themselves and going into partnership individually, it wasn't a partnership, we know, but pooling their interests individually with the Paramount Enterprises, Inc., they had the stock in Tivoli Operating Corporation that they would have received issued to the Walwal Corporation because it wasn't issued to the Walwal Corporation for rent, was it, that fifty per cent of the stock?
>
> "Mr. Handelman: No, not for rent, sir. * * * "

Mr. Handelman, a prior counsel in the case, is simply saying that the stock was not distributed to Walwal as rent. This is not in any way inconsistent with the petitioners' theory that although rent was paid at the minimum customary rate of fifteen per cent on gross receipts under the lease, the lease had an asset value in excess of minimum fair rent paid which Walwal contributed to Tivoli Operating thereby enhancing the real value of the capital stock issued to Paramount Enterprises by Operating to an amount far in excess of the $1,000 paid by Operating therefor.

Petitioners have not conceded that the impact of the conspiracy was not on Operating as stated by respondents at page 7 of their brief

In their argument that Tivoli Operating has sustained no injury as the result of the conspiracy, respondents assert that prior trial counsel Mr. Handelman) concedes the impact of the conspiracy was not on Operating, but such impact was on Walwal. Even assuming this statement of Mr. Handelman is not out of context, it is meaningless, since the complaint charges in effect in paragraph 85th that the impact of the conspiracy was on Operating, as well as on Walwal (A. 28). See paragraph of complaint numbered 85th instead of paragraph 83rd suggested by respondents.

Petitioners have not conceded that this action was not brought for the benefit of the Trustees of Operating as stated at pages 7 and 8 of the respondents' brief

Ultimately, the Walders will be the beneficiaries of a successful Tivoli Operating suit, since Walwal, as a stockholder in Operating, has an equity therein and the Walders own all of the Walwal stock. The fact that they have such an ultimate interest does not mean the corporation in which they have such an ultimate interest cannot be injured or damaged as the corporate entity representative of its stockholders to whom it is responsible. In fact, it is elemental that such stockholders could not sue in their stockholding capacity, but must sue through the corporation. This very rule was enunciated in dismissing the individual actions of the stockholders in the case at bar. The plaintiffs' (*i.e.*, petitioners') counsel's statement refers to the ultimate benefit to stockholders emanating from a recovery by Tivoli Operating Corporation which is the entity directly damaged.

The hypothetical case cited by the respondents at page 8 of their brief as indicative of non-injury to Tivoli Operating and has no relevancy to the facts in the case at bar

If Enterprises created a new corporation to operate the Tivoli Theatre in which it owned one hundred per cent of the stock, such a corporation could not be injured by the conspiracy and could not successfully sue. No fault can be found with this conclusion, since the solely owned subsidiary would be the exclusive creation of Enterprises and the conspiracy could not be the coercive inducement for the issuance of capital stock or the payment of management fees. The foregoing hypothetical case is, therefore, an absurd analogy. However, in a situation as in the case at bar where the victim of one phase of the conspiracy owned fifty per cent of the stock (*i.e.*, Walwal) and Paramount Enterprises, a co-conspirator, owned the other fifty per cent

of the stock, it could not be the stock control of the conspirator (*i.e.*, Paramount Enterprises) but the economic coercion emanating from the conspiracy which forced the corporation operating the Tivoli Theatre (*i.e.*, Tivoli Operating) to pay tribute to obtain a proper clearance of motion pictures.

Contrary to respondents' assertions at page 9 of their brief the Lefcourt and Pearlman affidavits were based upon the capital stock worth premised upon earning power as evidenced and justifies a trial of the issues

The record shows by the affidavits of these experts, completely ignored by the courts below, that based on earnings of Tivoli Operating from 1937 to 1947 the stock distributed to Paramount Enterprises for $1,000 was worth $61,000.

Also contrary to the statement of the respondents in their reply brief at page 9, although Tivoli Operating was a new corporation, the Tivoli Theatre which it operated as a successor to Tivoli Theatre, Inc., was an operating business and not a non-operating business as respondents claim (A. 46). This clearly justifies the opinion of the experts as to the value of the stock of an operating business as reflected by earnings when such business was unencumbered by delayed clearances of motion pictures.

Claims for management fees were not abandoned by petitioners as asserted by respondents at page 10 of their reply brief

Petitioners' counsel acquiesced in Judge Dimock's statement that the case boiled down to the fact that Tivoli Operating gave stock to the conspirators for considerably less than it was worth because of the conspiracy. The subject of the discussion at this time before Judge Dimock was the value of the stock and the plaintiffs' theory premised upon such value. There had been no discussion about management fees, so that comments by plaintiffs'

(*i. e.*, petitioners') counsel could not possibly be construed as abandoning plaintiffs' claim for management fees, alleged in the complaint. This question was also specifically before the court below and was completely ignored by it in rendering decision.

Conclusion

Respondents appear to concede at page 10 of their brief that the decision of the court below was premised upon the conjectures of Judge Dawson in *Fanchon & Marco, Inc.* v. *Paramount Pictures,* 133 F. Supp. 839, 845 (S. D. N. Y. 1955), which is fully quoted in the petition at pages 8 and 9. It seems reasonable to assume therefrom that there is an important undecided and novel question as set forth by petitioners at page 3 of their petition upon which this Court should decisively rule.

It also seems important for the reasons given in the petition that this Court should exercise its supervisory jurisdiction because of the failure of the court below to consider all of the issues specifically before it, particularly the question of management fees paid under the economic coercion of the Paramount conspiracy from 1937 to 1947 as alleged in paragraph 85th of the complaint (A. 28).

For each of the reasons set forth herein and in the petition, a writ of certiorari should be granted.

Respectfully submitted,

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